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Supreme Court of the United States

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, ET AI PETITIONERS,

vs.

LINCOLN W. MULKEY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR CERTIORARI FILED AUGUST 25, 1966

CERTIORARI GRANTED DECEMBER 5, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, ET AL., PETITIONERS,

vs.

LINCOLN W. MULKEY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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[fol. A]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Civil No.. .....

LINCOLN W. MULKEY, et al., Plaintiffs and Appellants,

vs.

NEIL REITMAN, et al., Defendants and Respondents.

Appeal from the Superior Court of Orange County
Honorable Raymond Thompson, Judge

Excerpts From Clerk's Transcript

APPEARANCES

For Plaintiffs and Appellants

David R. Caldwell, Attorney at Law, 1923 West 17th Street, Santa Ana, California.

For Defendants and Respondents

Richard V. Jackson, Attorney at Law, 800 South Brookhurst, Suite 30, Anaheim, California.

[fol. 2]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

No. 113493

LINCOLN W. MULKEY and DOROTHY J. MULKEY, Plaintiffs,

vs.

NEIL REITMAN, HERMAN STRAESSER, MRS. HERMAN STRAESSER, PEGGY WATSON, DOE I and DOE II.

COMPLAINT FOR DAMAGES (Denial of Civil Rights)—Filed May 29, 1963

Plaintiffs Allege:

I

Plaintiffs are husband and wife respectively: They are citizens of the United States and residence of the County of Orange, State of California; they are members of the Negro Race, and they are colored. Suit is filed also as a class action in behalf of all persons discriminated against because of their race and/or color as described herein below.

II

The true names and capacities, whether individual, corporate, associate or otherwise, of defendants Doe One and Doe Two are unknown to plaintiffs, who therefore sue said defendants by such fictitious names. Plaintiffs will ask leave of Court to amend their complaint to insert the true names of said defendants when same are ascertained.

III

[fol. 3] Defendants are engaged in the business of renting apartments to members of the public. Defendants, Neil

[File endorsement omitted]

Reitman and Doe I own an apartment building located at 1030 West Highland Street, City of Santa Ana, County of Orange, State of California. At all times mentioned herein defendants Herman Straesser, Mrs. Herman Straesser, Peggy Watson and Doe II were, and now are the managers of said apartment building and were and now are, the agents, servants and employees of the other defendants. At all times mentioned herein one or more apartments in said apartment building, were, and now are, unoccupied, and defendants offered them for rent to the public generally.

IV

In May of 1963, plaintiffs, who were willing and able to, offered to rent one of the apartments, referred to in Paragraph III from defendants.

V

Defendants have discriminated against plaintiffs, and have made a discrimination, distinction and restriction on account of plaintiffs' Color and Race contrary to the provisions of Sections 51 and 52 of the Civil Code of the State of California, in that they refused to allow plaintiffs to rent any of the apartments referred to in Paragraph III herein, solely on the basis of their Race and Color, although plaintiffs were and now are able to and desirous of renting said apartments.

[fol. 4]

VI

As a proximate result of the above conduct of the defendants, plaintiffs have been unable to rent an apartment, home, or other suitable place in which to live, and have suffered humility and disappointment, and have endured mental pain and suffering, all to their general damage in the sum of $50,000.00.

VII

Unless enjoined by order of Court, *pendente lite* and permanently, the defendants threaten to and will, in the course of business, refuse to rent apartments to the plaintiffs solely because they are colored and members of the Negro Race, and the defendants will similarly refuse to rent apartments to other persons soley because of such Color and Race.

VIII

By virtue of the acts of defendants complained of herein, plaintiffs, and those in the same class as plaintiffs, have suffered irreparable injury; and they have no adequate remedy at law because the discrimination by the defendants aforesaid is also practiced by other real estate brokers, home and apartment landlords and owners in Orange County and throughout California, resulting in preventing the plaintiffs and other American Citizens of the Negro Race and color from renting homes and apartments in Orange County as well as in California. Unless defendants [fol. 5] are enjoined from discriminating, plaintiffs will suffer irreparable harm because the apartments referred to herein will be rented to others.

Wherefore, plaintiffs pray judgment as follows:

1) That an immediate Order, an injunction pendente lite, and a permanent injunction issue from this Honorable Court, enjoining defendants from discriminating against plaintiffs and others similarly situated because of their Race and/or Color in the renting of apartments located at 1030 West Highland Street, in the City of Santa Ana, County of Orange, State of California, to plaintiffs, and others similarly situated, solely because of their race and/or color;

2) For general damages in the sum of $50,000.00;

3) For statutory damages in the sum of $250.00;

4) For exemplary damages in the sum of $50,000.00;

5) For costs of suit herein; and

6) For such other and further relief as the Court deems proper.

David R. Cadwell, Attorney for Plaintiffs.

[fol. 39]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

[Title omitted]

ANSWER TO COMPLAINT—Filed August 7, 1963

Comes now the defendants, Neil Reitman, Herman Straesser, Mrs. Herman Straesser; and Peggy Watson, and severing themselves from all other defendants herein, jointly and severally, admit, deny and allege as follows:

I

Defendants have no information or belief sufficient to enable them to answer the allegations of Paragraph I of the complaint, and basing their denial upon that ground, deny generally and specifically each and every allegation thereof.

II

Answering Paragraph III of the complaint, these defendants admit that Neil Reitman and Herman Straesser are engaged in the business of renting apartments to members of the public and that defendant Neil Reitman owns an apartment building located at 1030 West Highland Street in the City of Santa Ana, County of Orange, State of Cali-

[File endorsement omitted]

fornia. Further defendants admit that at all times mentioned in the complaint, defendant Herman Straesser was the manager of said apartment building and was in that [fol. 40] capacity an agent for defendant Neil Reitman. Further defendants admit that at all times mentioned in the complaint, one or more apartments in said apartment building were unoccupied and were being offered for rent to the public, and with these exceptions deny each and every matter, fact and allegation contained therein, and each and every part thereof, both generally and specifically.

III

Answering Paragraphs IV, V, VI, VII and VIII of plaintiffs' complaint on file herein, these answering defendants deny each and every, all and singular, generally and specifically and specifically, deny that plaintiffs offered to rent from defendants on the alleged occasion or on any other occasion whatsoever or at all or that plaintiffs have been injured or damaged in the sums alleged, or in any other sum or sums whatsoever or at all.

Comes Now the Defendants And For A First Affirmative Defense Allege:

I

Defendants are informed and believe and there on allege that at all times herein mentioned, the plaintiffs, Lincoln W. Mulkey, Dorothy Mulkey and plaintiffs witness Charles Canfield, were the agents of the National Association for the Advancement of Colored People and were acting within the purpose and scope of said agency at all times herein [fol. 41] mentioned. The National Association for the Advancement of Colored People hereinafter referred to as the N.A.A.C.P. for brevity sake and the American Civil Liberties Union, hereinafter referred to as the A.C.L.U. for brevity sake, acting through the plaintiffs and plaintiffs complaining witness Charles Canfield, have adopted and seek to enforce a policy which creates Civil strife and

incidents of alleged discrimination against Negro citizens within the State of California to give credence to their claims of discrimination in California to enforce demands for preferential treatment.

II

Pursuant to such policy, the N.A.A.C.P. and the A.C.L.U., its agents, the plaintiffs and the complaining witness herein have among other things:

(a) Maintained a system of continuous harrassment and creation of forced incidents against landlords in California and against defendants so that, upon information and belief, landlords throughout the State and the defendants are systematically harassed and subjected to artificially create racial incidents.

III

In order to make continued harrassment and incidents possible:

(a) The N.A.A.C.P. has systematically sought through its agents including the plaintiffs herein, to create litigation against landlords in California and the defendants [fol. 42] through the utilization of professional complaining witnesses and the creation of evidence of discrimination in bad faith where none existed.

IV

The aforesaid policy of these aforementioned organizations and their agents the plaintiffs herein, in creating litigation against landlords and the defendants herein in California is contrary to basic and inherit moral rights of the defendants; the purpose of the continuation of such policy is to maintain an unequal and unfair bargaining position with landlords in California to enable Negroes to obtain preferential treatment over members of other races in the State of California.

V

The instant complaint was filed by the N.A.A.C.P. as a part of the policy of that organization in enforcing and creating racial incidents upon which they base their demands for preferential treatment; that the plaintiffs herein and the N.A.A.C.P. have brought like litigation against other landlords in the State of California using the same complaining witness Charles Canfield; that in the instant case Richard Mulkey and the other plaintiffs herein never met the landlord or manager or agent of the landlord or manager prior to the bringing of this action alleging discrimination by the defendants herein; that Richard Mulkey and the plaintiffs herein never offered to rent from [fol. 43] the defendants herein; never gave the defendants herein the opportunity to ask any questions concerning the plaintiffs prospective ability to meet the rental payments and be responsible tenants. That the purpose of this litigation is to advance Negro demands in Orange County and in the State of California for better than equal treatment.

VI

The plaintiffs are figure head plaintiffs only and the real parties in interest are the N.A.A.C.P. and the A.C.L.U. who defendants are informed and believe and thereon allege are paying 60% and 40% of the costs of this suit respectively; that plaintiffs counsel is an attorney who in the general course of practice regularly represents the N.A.A.C.P. the A.C.L.U. and the Congress of Racial Equality and is so representing the N.A.A.C.P. in this proceeding; that the profits from this litigation, if any, go to the N.A.A.C.P. and the A.C.L.U. in respective shares, the proceeds to be utilized in like actions; that the named plaintiffs are paying little, if any, of the costs of this litigation and share little, if any, of any recovery herein sought.

VII

The action was commenced and is being prosecuted by plaintiffs and their principals against defendants without probable cause, and with a malicious intent for the purpose of annoying and harrassing the defendants.

VIII

[fol. 44] By reason of the aforesaid, plaintiffs come into this proceeding with unclean hands and under circumstances which as a matter of law and equity require judgment dismissing the complaint and petition for injunction herein.

Wherefore, defendants pray that plaintiffs take nothing by reason of their action and that defendants have and recover their costs of suit incurred herein.

Jackson and Thomason, By Richard V. Jackson, Attorneys for defendants.

We declare that we are the defendants in the within entitled action; that we have read the foregoing Answer to Complaint and know the contents thereof, and that the same is true as of our own knowledge, except as to these matters alleged on information and belief, and as to those matters, we believe them to be true.

We declare under penalty of perjury that the foregoing is true and correct.

Dated at Anaheim, California this 5 day of August, 1963.

Neil Reitman, Herman Straesser, Mrs. Herman Straesser, Peggy Watson.

[fol. 62]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

[Title omitted]

NOTICE OF MOTION FOR SUMMARY JUDGMENT FOR DEFENDANTS AND DECLARATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF—Filed December 23, 1964

To: Lincoln W. Mulkey and Dorothy J. Mulkey, Plaintiffs, and David R. Cadwell, their attorney:

Notice Is Hereby Given that on Thursday, December 31, 1964, at 9:30 A.M., or as soon thereafter as the matter can be heard, at the Court room of Department 4, of the above-entitled Court, at Santa Ana, California, Defendants will move the Court for an Order dismissing the Complaint and for entry of Summary Judgment in favor of Defendants and against Plaintiffs as prayed in the Answer herein.

Said motion will be made upon the ground that the action has no merit in that the passage of Proposition 14 has rendered Civil Code Sections 51 and 52 upon which this action is based null and void.

Said motion will be based upon this notice, the pleadings, records, and files herein and upon the declaration of Richard V. Jackson, attorney for Defendants, and the [fol. 63] memorandum of points and authorities filed and served herewith.

Dated: December 18, 1964.

Jackson, Thomason & Gillette, By Richard V. Jackson, Attorneys for Defendants.

[File endorsement omitted]

[fol. 64]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

[Title omitted]

No. 113493

DECLARATION IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT—Filed December 23, 1964

I, Richard V. Jackson, declare and say:

That I am the Attorney for Defendant, Neil Reitman, et al., above-named; that the 1964 passage of Proposition No. 14, prevents further proceedings under Civil Code Sections 51 and 52, and that whether Defendants refuse to allow Plaintiffs to rent an apartment solely on the basis of their race and color, has become a moot point because Proposition 14, a Constitutional Amendment, prohibits all actions by the State, or any agency thereof, in this field, thus preventing the enforcement of Civil Code Sections 51 and 52.

Also, Plaintiffs seek a permanent injunction, prohibiting Defendants from discriminating forever on the grounds of race, color, or creed, in the rental of their property.

Any enforcement of Sections 51 and 52 by the Court would clearly appear to be State action, which would be applied prospectively beyond the power of the Court under the Amendment referred to herein.

[fol. 65] I declare under penalty of perjury that the foregoing is true and correct.

Executed at Anaheim, California, this 18th day of December, 1964.

Jackson, Thomason & Gillette, By Richard V. Jackson, Attorneys for Defendants.

[File endorsement omitted]

[fol. 70]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

MINUTE ENTRY OF GRANTING MOTION FOR SUMMARY JUDGMENT—December 31, 1964

Motion granted.

[fol. 71]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

[Title omitted]

ORDER ENTERING JUDGMENT FOR DEFENDANTS—January 8, 1965

The Motion of the defendants herein for Judgment having come on regularly for hearing the 31st day of December, 1964, and plaintiffs appearing by David R. Cadwell, their counsel, and defendants appearing by Richard V. Jackson, their counsel, and both parties having agreed that further prosecution of this action is barred by the provisions of that amendment to the California Constitution known as "Proposition 14", the plaintiffs, however, having contended that said constitutional amendment should not be applied as it is void as being inconsistent with our state and federal constitutions, and the matter having been submitted for decision and good cause appearing therefore, and the Court having determined that a valid amendment to our State Constitution having been enacted by the people which bars further prosecution of this case.

It Is Hereby Ordered that Judgment be entered for defendants against the plaintiffs.

Dated: January 5, 1965.

Raymond Thompson, Judge of the Superior Court.

[File endorsement omitted]

[fol. 72]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

No. 113493

LINCOLN W. MULKEY and DOROTHY J. MULKEY, Plaintiffs,

vs.

NEIL REITMAN, HERMAN STRAESSER, MRS. HERMAN STRAESSER, PEGGY WATSON, DOE I and DOE II, Defendants.

JUDGMENT—January 8, 1965

Defendants Motion for Judgment having been granted and good cause appearing therefore;

It Is Hereby Ordered, Adjudged and Decreed that defendants have Judgment in the within action, and that plaintiffs take nothing by their action.

Dated: January 5, 1965.

Raymond Thompson, Judge of the Superior Court.

[fol. 73]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

[Title omitted]

NOTICE OF APPEAL AND DESIGNATION OF CONTENTS OF TRANSCRIPT ON APPEAL—Filed January 22, 1965

To W. E. St. John, Clerk of the Superior Court:

You Will Please Take Notice that Plaintiffs hereby appeals to the Supreme Court from the Judgment of the Court

[File endorsement omitted]

in favor of defendants on January 5, 1965, and the whole thereof.

You are hereby requested to prepare a Record on Appeal consisting of the items contained in the Stipulation of the parties filed herein.

You are further requested to prepare a Reporter's transcript of all oral proceedings on December 31, 1964.

David R. Cadwell, Attorney for Plaintiffs.

[fol. 74] Proof of Service by Mail (omitted in printing).

[fol. 78] Clerk's Certificate (omitted in printing).

[fol. 79]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

LINCOLN W. MULKEY et al., Plaintiffs and Appellants,

v.

NEIL REITMAN et al., Defendants and Respondents.

OPINION—May 10, 1966

Plaintiffs appeal from a summary judgment entered upon the granting of a motion therefor in an action for relief under sections 51 and 52 of the Civil Code.[1]

---

[1] Civil Code, section 51, provides as follows:

"All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

Civil Code, section 52, provides as follows:

"Whoever denies, or who aides, or incites such denial, or whoever makes any discrimination, distinction or restriction on account

[File endorsement omitted]

[fol. 80] In the trial court proceedings allegations of the complaint were not factually challenged, no evidence was introduced, and the only matter placed in issue was the legal sufficiency of the allegations. The motion for judgment, therefore, properly should be designated as one for judgment on the pleadings and will be so treated on appeal. In any event the allegations of the complaint stand as admitted for our purposes. (See Davis v. City of Santa Ana, 108 Cal.App. 2d 669, 685.)

Plaintiffs' complaint sets forth that they are husband and wife, citizens of the United States and residents of the County of Orange; that they are Negroes; that defendants are the owners and managers of a certain apartment building in Orange County; that in May 1963 at least one apartment therein was unoccupied and was being offered by defendants for rent to the general public; that plaintiffs offered to rent any one of available apartments and were willing and able to do so; that defendants refused to rent any of the available apartments to plaintiffs solely on the ground that plaintiffs were Negroes; that because of such refusal plaintiffs were unable to rent a suitable place to live; that they suffered humiliation and disappointment and endured mental pain and suffering; that defendants will continue to refuse to rent to plaintiffs and other members of their race solely on the ground of such race unless restrained by order of the court; that plain-
[fol. 81] tiffs have no adequate remedy at law because the discrimination practiced by defendants is also practiced by other real estate brokers, and home and apartment landlords and owners in Orange County.

The motion for judgment was made and granted solely on the ground, as stated by the trial court, "that the pass-

---

of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code."

age of Proposition 14 has rendered Civil Code Sections 51 and 52 upon which this action is based null and void." The reference is to the initiative measure which appeared as Proposition 14 upon the statewide ballot in the general election of 1964. Following its approval by the voters it was incorporated into the California Constitution as article I, section 26.

Plaintiffs unsuccessfully opposed the motion on the ground that article I, section 26, is void for constitutional reasons under both the state and federal Constitutions. This contention presents the sole question on appeal.

Proposition 14, as now incorporated into the California Constitution, provides in full as follows:

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, [fol. 82] lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

" 'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

" 'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

"This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purpose by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

"If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or cir- [fol. 83] cumstances, shall not be affected thereby and shall continue in force and effect. To this end the provisions of this Article are severable." (Cal. Const., art. I, § 26.)

For reasons which hereafter appear we do not find it necessary to discuss claims of the unconstitutionality of article I, section 26, based on California constitutional provisions and law. Our resolution of the question of constitutionality is confined solely to federal constitutional considerations. We note preliminarily that although we are examining a provision which, by its enactment by ballot, has been accorded state constitutional stature, the supremacy clause of the United States Constitution nevertheless compels that section 26, like any other state law, conform to federal constitutional standards before it may be enforced against persons who are entitled to protection under that Constitution. (See Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 736-737.)

A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective (In re Petraeus (1939) 12 Cal.2d 579, 583; see Griffin v. County School Board, 377 U.S. 218, 231), and for its ultimate effect (Jackson v. Pasadena City School Dist. (1963) 59 Cal.2d 876, 880; Gomillion v. Lightfoot (1960) 364 U.S. 339, 341-343; Avery v. Georgia (1953) 345 U.S. 559, 562; Near v. Minnesota (1931) 283 U.S. 697, 708- [fol. 84] 709). To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment. (Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645; Evans v. Selma Union High School Dist. (1924) 193 Cal. 54, 57-58; see Snowden v. Hughes (1944) 321 U.S. 1, 8-9.)

In 1959, the State Legislature took the first major steps toward eliminating racial discrimination in housing. The

Unruh Civil Rights Act (Civ. Code, §§ 51-52) prohibited discrimination on grounds of "race, color, religion, ancestry, or natural origin" by "business establishments of every kind." On its face, this measure encompassed the activities of real estate brokers and all businesses selling or leasing residential housing. (See Lee v. O'Hara (1962) 57 Cal.2d 476; Burks v. Poppy Construction Co. (1962) 57 Cal.2d 463.)

At the same session the Legislature passed the Hawkins Act (formerly Health & Saf. Code, §§ 35700-35741) that prohibited racial discrimination in publicly assisted housing accommodations. In 1961 the Legislature broadened its attempt to discourage segregated housing by enacting proscriptions against discriminatory restrictive covenants affecting real property interests (Civ. Code, § 53) and racially restrictive conditions in deeds of real property (Civ. Code, § 782).

[fol. 85] Finally in 1963 the State Legislature superseded the Hawkins Act by passing the Rumford Fair Housing Act. (Health & Saf. Code, §§ 35700-35744.) The Rumford Act provided that "The practice of discrimination because of race, color, religion, natural origin, or ancestry is declared to be against public policy" and prohibited such discrimination in the sale or rental of any private dwelling containing more than four units. The State Fair Employment Practice Commission was empowered to prevent violations.

Proposition 14 was enacted against the foregoing historical background with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right. In short, Proposition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market.

Prior to its enactment the unconstitutionality of Proposition 14 was urged to this court in Lewis v. Jordan, Sac. 7549 (June 3, 1964). In rejecting the petition for mandamus to keep that proposition off the ballot we stated in

our minute order "that it would be more appropriate to pass on those questions after the election . . . than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls. . . ." But we further noted in the order [fol. 86] that "there are grave questions whether the proposed amendment to the California Constitution is valid under the Fourteenth Amendment to the United States Constitution. . . ." We are now confronted with those questions.

Plaintiffs' basic contention is that the foregoing provisions cannot constitutionally withstand the mandate contained in section 1 of the Fourteenth Amendment to the United States Constitution that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Thus, the constitutional proscription invoked is twofold. First, it is a limitation on state, as distinguished from private action and, second, it directs that such state action, where undertaken, meet certain minimum standards. If we assume for the moment that the state has undertaken to act in these circumstances, then the pertinent issue becomes whether such action accords equal protection of the laws to plaintiffs. We consider such issue initially.

It is now beyond dispute that the Fourteenth Amendment, through the equal protection clause, secures, without discrimination on account of color, race [or] religion, 'the right to *acquire* and *possess* property of every kind' . . ." (Buchanan v. Warley (1917) 245 U.S. 60, 62, emphasis added.) In Shelley v. Kraemer, 334 U.S. 1, the court expressed itself as follows at page 10: ". . . among the civil rights intended to be protected from discriminatory state [fol. 87] action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

(See also Brown v. Board of Education (1954) 347 U.S. 483; Barrows v. Jackson (1953) 346 U.S. 249; Jackson v. Pasadena City School Dist. (1963) *supra*, 59 Cal.2d 876; Sei Fujii v. California (1952) 38 Cal.2d 718.)

The question of the fact of discrimination, by whatever hand, should give us little pause. The very nature of the instant action and the specific contentions urged by the defendants must be deemed to constitute concessions on their part that article I, section 26, provides for nothing more than a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved. Thus, as a complete and only answer to plaintiffs' allegations which irrefutably establish a discriminatory act, defendants urge that section 26 accords them the right as private citizens to so discriminate. The only real question thus remaining is whether the discrimination results solely from the claimed private action or instead results at least in part from state action which is [fol. 88] sufficiently involved to bring the matter within the proscription of the Fourteenth Amendment. For the reasons stated below we have concluded that state action is sufficiently involved to fall within the reach of the constitutional prohibition.

The parties generally concede that in an organized and regulated society the state or its subdivision play some part in most, if not all, so-called private transactions, and it must be acknowledged, without specifically enumerating them, that many of the rights and duties arising out of the transfer of an interest in real property are related to or dependent upon the state or local governments. But it is not the mere fact that in some manner the state is involved, however remotely, with which we are concerned. It is only where the state is significantly involved that the prohibitions of the equal protection clause are invoked. The Supreme Court in Burton v. Wilmington Parking Authority (1961) 365 U.S. 715, stated the proposition in the

following language at page 722: ". . . private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have been involved in it." That proscribed state involvement is not to be limited to direct conduct on the part of its employees, agents and representatives is made apparent by the court's further statement at page 722: "Only by sifting facts and weighing circumstances can the nonobvious in- [fol. 89] volvement of the State in private conduct be attributed its true significance." More recently the Supreme Court has stated: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." (Evans v. Newton (1966) 382 U.S. —.)

However subtle may be the state conduct which is deemed "significant," it must nevertheless constitute action rather than inaction. The equal protection clause and, in fact, the whole of the Fourteenth Amendment, is prohibitory in nature and we are not prepared to hold, as has been urged, that it has been or should be construed to impose upon the state an obligation to take positive action in an area where it is not otherwise committed to act. Urged in support of such proposition is James v. Marinship Corporation, 25 Cal.2d 721. But the prior state commitment in that case is clear. We held that a so-called private labor union could not racially discriminate against those who wished to become members, but we first concluded that the union, because it had obtained a monopoly on the labor supply, was like a public service business which, under the law of the state, was precluded from discriminating on the basis of race. Likewise, in Jackson v. Pasadena City School Dist., *supra*, 59 Cal.2d 876, the state, because it had undertaken [fol. 90] through school districts to provide educational facilities to the youth of the state, was required to do so in a manner which avoided segregation and unreasonable racial imbalance in its schools.

The problem thus becomes one of ascertaining positive state action of a degree sufficient to be deemed significant in the accomplishment of the recognized and admitted discrimination.

To conclude that there is state action in the instant circumstances we are not limited to action by one who, cloaked with the authority of the state, acts as its designated representative. In the broad sense, state action has been consistently found where the state, in any meaningful way, has lent its processes to the achievement of discrimination even though that goal was not within the state's purpose. Thus, state conduct has been found in the action of a trial court in enforcing a privately created restrictive covenant which prevented a sale of real property to a Negro buyer. (Shelley v. Kraemer, *supra*, 334 U.S. 1.) In that case the court stated at page 14: ". . . [T]he Amendment makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.'" In applying the *Shelley* reasoning that the processes of the court cannot be utilized to accomplish a private discrimination, it has been [fol. 91] held reversible error to exclude evidence that the plaintiff landlord in an eviction proceeding was motivated purely by racial considerations, although the defendant tenant was admittedly in default. (Abstract Investment Co. v. Hutchinson, 204 Cal.App.2d 242.)

Shelley, and the cases which follow it, stand for the proposition that when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved. The instant case may be distinguished from the *Shelley* and the *Abstract* cases only in that those who would discriminate here are not *seeking* the aid of the court to that end. Instead they are in court only because they have been summoned there by those against whom they seek to discriminate. The court is not asked to enforce a covenant

nor to eject a tenant, but only to render judgment denying the relief sought in accordance with the law of the state. Thus, it is contended by defendants that the isolated act of rendering such a judgment does not significantly involve the state in the prior act of discrimination.

It must be recognized that the application of *Shelley* is not limited to state involvement only through court proceedings. In the broader sense the prohibition extends to any racially discriminatory act accomplished through the [fol. 92] significant aid of any state agency, even where the actor is a private citizen motivated by purely personal interests. (See Burton v. Wilmington Pkg. Auth., *supra*, 365 U.S. 715, 722.) Thus, in Marsh v. Alabama, 326 U.S. 501, an entire town was owned by a purely private company, the agents of which caused the arrest for trespass of persons engaged in exercising their constitutional freedom of speech. Although no governmental officials or agents were involved, the Supreme Court found sufficient state action to invoke the Fourteenth Amendment. This was based on the view that the company managers were performing a governmental function of managing and controlling a town wherein persons resided who were entitled to Fourteenth Amendment protections: ". . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, where held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties. . . ." (Marsh v. Alabama, *supra*, at p. 509.) There, as contended by defendants in the instant case, the state did not participate except to condone private action.

Even more applicable in the instant circumstances are the so-called "white primary cases." (Smith v. Allwright, 321 U.S. 649; Terry v. Adams, 345 U.S. 461; Nixon v. Con- [fol. 93] don, 286 U.S. 73; Baskin v. Brown, 174 F.2d 391; Rice v. Elmore, 165 F.2d 387.) In those cases private action infringing the right to vote was held to be the equivalent of state action where accomplished with the culpable

permission of the state. In Nixon v. Condon, *supra,* 286 U.S. 73, for instance, a state statute which forbade voting by Negroes in primaries was declared to be unconstitutional. It was thereupon repealed and a substitute measure enacted which was wholly permissive, that is, political parties were allowed to prescribe the qualifications for membership and voting rights in the party's primaries. A local political party thereafter barred Negroes from voting in its primaries and it was held that the permissive private action was chargeable as state action. (See also Baskin v. Brown, *supra,* 174 F.2d 391, 394.)

A similar abdication of a traditional governmental function for the obvious purpose of condoning its performance under color of private action has recently been struck down by the Supreme Court in Evans v. Newton, *supra,* 382 U.S. ——. There, a park for the enjoyment of white persons was owned, managed and maintained by the City of Macon, Georgia, as trustee under the 1911 will of Senator August Bacon. When a question was raised whether the city could continue to maintain the segregated park consistent with the Equal Protection Clause, it purported to transfer the park to private trustees with the intent that it would con- [fol. 94] tinue to be maintained for the enjoyment of white persons only. The foregoing conduct on the part of the municipality was held to be proscribed by the Fourteenth Amendment.

It is contended by defendants, however, that the foregoing cases, in the main, involved some recognized governmental function which, although undertaken by private persons, nevertheless was required to be performed in the same non-discriminatory manner as would be required in the case of performance by the state. Such contention fails to recognize the basic issue involved. Those cases are concerned not so much with the *nature* of the function involved as they are with *who* is responsible for conduct in performance of that function. If the function is traditionally governmental in nature unquestionably the state is responsi-

ble. But this cannot be the only instance wherein the state assumes responsibility—it is also responsible when, as we have stated, it becomes significantly involved in *any* discriminatory conduct. (See Burton v. Wilmington Pkg. Auth., *supra,* 365 U.S. 715, 722.)

Going to the question of what constitutes significant involvement, it is established that even where the state can be charged with only encouraging discriminatory conduct, the color of state action nevertheless attaches. Justice Black, in writing for the majority in Robinson v. Florida, 378 U.S. 153, 156, and for the dissenters in Bell v. Mary-[fol. 95] land, 378 U.S. 226, 334, asserted that private racial discrimination violated the Fourteenth Amendment once the state in any way discourages integration or instigates or encourages segregation. In Barrows v. Jackson, *supra,* 346 U.S. 249, in holding that a racially restrictive covenant could not constitutionally support a suit for damages, the court explained at page 254: "The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages."

Proscribed governmental encouragement of private discrimination has not been confined to the courts. Anderson v. Martin, 375 U.S. 399, involved racial labeling of candidates on ballots. Although the state practice did not *require* discrimination on the part of individual voters, it was struck down because it *encouraged* and assisted in discrimination. (See also Baldwin v. Morgan, 287 F.2d 750.) Similarly, as early as 1914, in McCabe v. Atchison T. & S.F. Ry., 235 U.S. 151, it was stated at page 162 that the denial of equal railroad facilities to Negroes by a private railroad was unconstitutional state action on the ground

[fol. 96] that the right to discriminate was authorized by a local statute and that should the carrier perpetrate such discrimination it would be acting under "the authority of a state law." The court reasoned that state *authorization* to discriminate was no less state action than state *imposed* discrimination. (See also Boman v. Birmingham Transit Company, 280 F.2d 531.)

The Supreme Court has recently spoken out against state action which only authorizes "private" discrimination. In Burton v. Wilmington Pkg. Auth., *supra,* 365 U.S. 715, the court had before it the question of whether the State of Delaware discriminated against a Negro who was excluded from a privately-operated restaurant leased from a public agency of that state. The court stated at page 725 that the state "not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity. . . ." In a concurring opinion Justice Stewart, concluding that the state enactment involved, as construed by the state court, *authorized* discrimination, stated at page 727: "I think, therefore, that the appeal was properly taken, and that the statute, as authoritatively construed by the Supreme Court of Delaware, is constitutionally invalid." Even the dissenting [fol. 97] justices agreed that if the state court had construed the state enactment as authorizing racial discrimination, there was a denial by the state of equal protection of the laws, Justice Frankfurther stating at page 727: "For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment."

In a case involving a fact situation similar to *Burton,* and clearly pertinent to our present inquiry, a Tennessee statute renounced the state's common law cause of action

for exclusion from hotels and other public places and declared that operators of such establishments were free to exclude persons for any reason whatever. In the particular circumstances of that case the statute was deemed to bear on the issues "only insofar as" it "expressed an affirmative state policy fostering segregation." The court stated that: "our decisions have foreclosed any possible contention that such a statute . . . may stand consistently with the Fourteenth Amendment." (Turner v. City of Memphis (1962) 369 U.S. 350, 353.)

The instant case presents an undeniably analogous situation wherein the state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make [fol. 98] possible private discriminatory practices which previously were legally restricted. We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible. Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged, within the meaning of the cited decisions. Certainly the act of which complaint is made is as much, if not more, the legislative action which authorized private discrimination as it is the final, private act of dscrimination itself. Where the state can be said to act, as it does of course, through the laws approved by legislators elected by the popular vote, it must also be held to act through a law adopted directly by the popular vote. When the electorate assumes to exercise the law-making function, then the electorate is as much a state agency as any of its elected officials. It is thus apparent that, while state action may take many forms, the test is not the novelty of the form but rather the ultimate result which is achieved through the aid of state processes. And if discrimination

is thus accomplished, the nature of proscribed state action must not be limited by the ingenuity of those who would seek to conceal it by subtleties and claims of neutrality. [fol. 99] Contrary to defendants' claims, the state's abstinence from making the decision to discriminate in a particular instance does not confer upon it the status of neutrality in these circumstances. Justice Byron R. White's view of the facts in Evans v. Newton, supra, 382 U.S. —, poses an almost identical issue to that here presented. In his view the majority in *Evans* were not justified on the record in concluding that the City of Macon was continuing to operate and maintain the park there involved after transfer to private trustees, and he grounded his conclusion of proscribed state action on 1905 legislation which did not compel but would nevertheless make it possible for the maintenance of segregated private parks for either white or colored persons. His reasoning and resolution of the issue are stated at page — in the following language: "As this legislation does not compel a trust settlor to condition his grant upon use only by a racially designated class, the State cannot be said to have directly coerced private discrimination. Nevertheless, if the validity of that racial condition in Senator Bacon's trust would have been in doubt but for the 1905 statute and if the statute removed such doubt only for racial restrictions, leaving the validity of nonracial restrictions still in question, the absence of coercive language in the legislation would not prevent application of the Fourteenth Amendment. For such a statute would depart from a policy of strict neutrality in matters of private discrimination by [fol. 100] enlisting the State's assistance only in aid of racial discrimination and would so involve the State in the private choice as to convert the infected private discrimination into state action subject to the Fourteenth Amendment."

From the foregoing it is apparent that the state is at least a partner in the instant act of discrimination and that

its conduct is not beyond the reach of the Fourteenth Amendment.

The question remains whether section 26 in whole or in part must be struck down. It is argued, and with merit, that in many applications no unconstitutional discrimination will result and, as noted, it is specifically provided in the amendment that "If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable." Does such severability clause save the amendment for piecemeal judicial scrutiny as specific instances of its application arise?

We have recognized that a statute which has unconstitutional applications may nevertheless be effective in those [fol. 101] instances where the Constitution is not offended. (See Franklin Life Ins. Co. v. State (1965) 63 A.C. 221.) In the *Franklin* case a taxing statute was held to have been properly applied despite the "possibility of hypothesizing an unconstitutional application of the statute." (P. 226.) But in refusing to declare the statute unconstitutional on its face, we stated at page 227: " . . . [W]hen the application of the statute is invalid in certain situations we cannot enforce it in other situations if such enforcement entails the danger of an uncertain or vague future application of the statute [citations]. We have been particularly aware of fomenting such danger of uncertainty in the application of a statute which would inhibit the exercise of a constitutional right (*In re Blaney, supra*) or impose criminal liability. . . . As the United States Supreme Court has said in rejecting an argument that a statute violative of the Fifth Amendment could be constitutionally applied to the case before it, such a 'course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.' [Citations.]" (See also Thornhill v. Ala-

bama, 310 U.S. 88; Carlson v. California, 310 U.S. 106; Jones v. Opelika, 319 U.S. 103.)

The instant case, of course, relates directly to the personal liberties distinguished in *Franklin*. This was also true in the case of In re Blaney (1947) 30 Cal.2d 643, re- [fol. 102] ferred to in *Franklin*. In the *Blaney* case the "Hot Cargo Act," which declared secondary boycotts unlawful, was struck down on the ground that in some instances sympathetic strikes and other labor coercion could not be constitutionally restrained, although it was recognized that in other instances the statute could be lawfully applied. The court held that the provisions of the statute did not differentiate between the constitutional and unconstitutional applications, stating that "The only way in which such segregation could be made would be by judicial interpretation, first holding that the act as it stands is wholly unconstitutional, but then determining that, by inserting qualifications and exceptions in the statutory language, a judicially reformed statute might be given some effect." (In re Blaney, *supra*, 30 Cal.2d 643, 655.) We further held in *Blaney* that a severability clause is ineffective to sustain valid portions or applications of a statute unless ". . . the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words," and that where the statute is not so severable ". . . then the void part taints the remainder and the whole becomes a nullity." (P. 655.)

It is immediately apparent from the operative portion of the instant constitutional amendment that it is mechanically impossible to differentiate between those portions or [fol. 103] applications of the amendment which would preserve the right to discriminate on the basis of race, color or creed, as distinguished from a proper basis for discrimination. The purported preservation of the right to discriminate on whatever basis is fully integrated and, under the rule on *Blaney*, not severable. Moreover, while we

can conceive of no other purpose for an application of section 26 aside from authorizing the perpetration of a purported private discrimination where such authorization or right to discriminate does not otherwise exist, any such other purpose clearly "entails the danger of an uncertain or vague future application of the [enactment]" and would thus require that it be struck down. (Franklin Life Ins. Co. v. State (1965) 63 A.C. 221, 227.)

For the foregoing reasons the severability clause is ineffective in the instant case, and the whole of the constitutional amendment must be struck down.

Article I, section 26, of the California Constitution thus denied to plaintiffs and all those similarly situated the equal protection of the laws as guaranteed by the Four- [fol. 104] teenth Amendment to the federal Constitution, and is void in its general application.

The judgment is reversed.

Peek, J.

We Concur: Traynor, C. J., Peters, J., Tobriner, J., Burke, J.

[fol. 105]

DISSENTING OPINION OF WHITE, *J.* TO OPINION OF PEEK, *J.*

I dissent.

In the final analysis as I view it, the primary issue here presented is whether article I, section 26,[1] added to our state Constitution by the people as an initiative measure (Proposition 14) at the general election of November 3, 1964, by a vote of 4,526,460 to 2,395,747, is a valid exercise of state legislative power in choosing not to regulate the private conduct of residential property owners in the sale or rental of their own private property, even if that

[1] For convenience this section of the Constitution will be referred to as section 26.

conduct is discriminatory on racial or religious grounds, or whether such a legislative choice by the people violates the provisions of the Fourteenth Amendment to the Constitution of the United States or federal law.

[fol. 106] While the attack in the briefs on the constitutionality of section 26 encompasses some highly emotional and, I feel, inaccurate charges as to its scope, meaning and effect, such as that by its adoption California has taken "affirmative action of a definite and drastic sort . . . [amounting] to condonation or approval of race discrimination in the sale, leasing and rental of housing . . . "; that it is an "affirmative declaration that the State will never do anything to prevent or eliminate that discrimination"; that it puts "the State in direct opposition to national policy"; and that its effect is "not merely to repeal the Unruh and Rumford Acts but to authorize racial discrimination in the renting of residential property," I am impressed, from a calm and dispassionate reading of section 26, that it is manifest that actually the measure amounts only to a legislative choice by the people acting through the power reserved to them by article IV, section 1, of our California Constitution that a particular method of attempting to solve the problem of housing for minorities, i.e., the imposition of governmental sanctions on *private residential property owners* shall not now be employed; that the state policy which existed in California prior to 1959 shall be restored; and that there be reserved to the people the exclusive legislative power to change or modify this policy.

[fol. 107] Prior to the adoption of the Unruh Act, the California Legislature had chosen not to regulate the conduct of property owners in selecting their buyers or tenants whether or not the choice was based on race, color or creed. By the enactment of the Unruh Act in 1959, the Legislature chose to regulate racial and religious discrimination by persons in "business establishments of every kind whatsoever," including persons engaged in the business of selling

or renting residential property, brokers and others. (Burks v. Poppy Construction Co., 57 Cal.2d 463, 468; Lee v. O'Hara, 57 Cal.2d 476, 478.) From September 1963, until section 26 of article I became effective, by enacting the Rumford Act, the Legislature chose to regulate specifically such discriminating conduct by owners of most but not all residential property. Then, in November 1964, by enacting section 26 of article I of the Constitution, the people exercised their legislative prerogative and declared that the conduct of a private property owner in refusing to sell or rent his property for whatever reason, should not be regulated by the state but should be left to private self-determination, but the legislation regulating persons other than the property owner when dealing with his own property was left in full force. Nor did the adoption of section 26 interfere with or impair the nearly century-old history [fol. 108] of legislation affecting race relations in California commencing as it did in 1872 with the enactment of legislation prohibiting innkeepers and common carriers from discriminating in making their facilities available to all races and creeds (now Pen. Code, § 365), legislation which prohibited discrimination in "public accommodations" (Stats. 1893, ch. 185, p. 220). Those provisions which became sections 51-54 of the Civil Code in 1905 and were amended in 1919 and 1923 (Stats. 1919, ch. 210, p. 309; Stats. 1923, ch. 235, p. 485) guaranteed to "All citizens . . . full and equal accommodations . . . of inns, restaurants, hotels, eating houses . . . barber shops, bath houses, theatres, skating rinks, public conveyances, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens." Then in 1925 and succeeding years followed statutory prohibitions against race discrimination in the employment of teachers in California school districts, in civil service, in public works employment, and assistance programs for needy and distressed persons.

In 1959 the Legislature enacted a measure popularly known as the "Hawkins Act" (Health & Saf. Code. §§ 35700-35741) which prohibited "The practice of discrimination [fol. 109] because of race, color, religion, national origin or ancestry in any *publicly assisted housing accommodations*. . . . " (Emphasis added.) Also adopted at the 1959 legislative session was the California Fair Employment Practice Act (Lab. Code, §§ 1410-1432) prohibiting racial discrimination by certain employers and labor unions, thereby protecting and safeguarding the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, creed, color, national origin or ancestry. None of these guarantees against racial discrimination have been modified or impaired by the challenged constitutional amendment now engaging our attention.

In 1963 the Legislature, in enacting what is commonly known as the "Rumford Act" (Health & Saf. Code, §§ 35700-35744), chose to broaden the policy enunciated in the Hawkins Act, *supra,* with regard to discrimination in housing by extending the provisions of the Unruh and Hawkins Acts to regulate specifically discriminating conduct not only by persons in business establishments of every kind whatsoever, including persons engaged in the business of selling or renting residential property, brokers and others, but regulating such discriminatory conduct by owners of residential property containing more than four units even though not "publicly assisted." It was this [fol. 110] latter declared public policy only that was affected by the adoption of section 26.

I am impressed that charges made in the briefs of plaintiffs and amicus curiae that the measure here under consideration was prompted by vicious motives cannot be sustained as against the clear language of the measure itself and the argument that was made to all the voters who cast their ballots at the election.

To discriminate means, insofar as applicable to the instant case, "To make a difference in treatment or favor

(of one as compared with others)"; discrimination means ". . . an unfair or injurious distinction." (Webster's New Internat. Dict. (2d ed. 1954).) Contrary to the statutes and laws struck down because of racial discrimination in the cases relied upon by the majority, article I, section 26, now before us, grants equal rights and protection of the law to *any person without regard to race, religion or color,* to sell, lease or rent residential real property to *any person as he chooses.* Where is there discrimination or denial of equal rights to all in this enactment?

But, says the majority opinion, "It is now beyond dispute that the Fourteenth Amendment [Constitution of the United States], through the equal protection clause, se- [fol. 111] cures 'the right to *acquire* and *possess* property of every kind . . . without discrimination on account of color, race [or] religion. . . .' (Buchanan v. Warley (1917) 245 U.S. 60, 62-63.) . . . The question of the fact of discrimination by whatever hand, should give us little pause. The very nature of the instant action and the specific contentions urged by the defendants must be deemed to constitute concessions on their part that article I, section 26, provides for nothing more than a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved."

The answer to that is that section 26 does not sanction or condone racial or religious discrimination. It is rather a declaration of neutrality in a relatively narrow area of human conduct: the exercise of the discretion of a property owner to sell or not to sell or to rent or not to rent his residential property.

Since it is conceded that "Individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment" (Civil Rights Cases, 109 U.S. 3, 11), it seems to me that any sound analysis of the constitutionality of section 26 must begin with the well established, but frequently ignored, premise that the prohibitions of the Four-

[fol. 112] teenth Amendment are directed at *conduct for which the state is responsible or significantly involved* and do not extend to private conduct however wrongful, discriminatory, unethical or violative of what may be regarded by many as the real philosophy of human relations. In other words, the state must be held *responsible* for denying a citizen the equal protection of the law.

The major constitutional attack on section 26 as contained in the majority opinion would seem to begin with the fallacious assumption of the existence of a federal constitutional right to acquire property without racial discrimination from another citizen and leaps to the conclusion that the failure of the state to enforce that *constitutional right* inevitably involves the state in the constitutionally prohibited discrimination so significantly as to violate the Fourteenth Amendment. Nothing in the federal Constitution gives to one citizen the right to acquire property from another citizen who does not wish to sell it to him even if the refusal to sell is based on race or religion. A federal constitutional right arises only if the state is responsible for such discriminatory conduct or to some significant extent has been found to have become involved in it.

[fol. 113] I am persuaded that in the absence of significant state involvement, the refusal of a property owner to sell or lease his property upon the grounds of race raises no federal constitutional question. As declared by the United States Supreme Court in the leading case of Burton v. Wilmington Parking Authority (1961) 365 U.S. 715, 722 [6 L.Ed.2d 45]: "[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some *significant extent* the state in any of its manifestations has been found to have become *involved* in it." (Emphasis added.)

And as was said by Mr. Justice Harlan in his concurring opinion in Peterson v. Greenville (1963) 373 U.S. 244, 249-250 [10 L.Ed.2d 323, 327], "The ultimate substantive

question is whether there has been 'State action of a particular character' (*Civil Rights Cases, supra* [109 U.S. at 11])—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination.

"This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: [fol. 114] liberty and equality. *Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference.* This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. *Also inherent in the concept of State action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.*" (Emphasis added.)

And since section 26, here in question, involves *residential* property, the views of Mr. Justice Douglas in his concurring opinion in Lombard v. Louisiana, 373 U.S. 267 at pp. 274-275 [10 L.Ed.2d 338, at p. 343] (one of the 1963 sit-in decisions) are cogent:

"If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the State against the intruder. For the Bill of Rights, as applied to the States through the Due Process Clause of the Fourteenth Amendment, casts its weight on the side of the privacy of homes. The Third Amendment [fol. 115] with its ban on the quartering of soldiers in private homes radiates that philosophy. The Fourth Amend-

ment, while concerned with official invasions of privacy through searches and seizures, is eloquent testimony of the sanctity of private premises. For even when the police enter a private precinct they must, with rare exceptions, come armed with a warrant issued by a magistrate. A private person has no standing to obtain even limited access. The principle that a man's home is his castle is basic to our system of jurisprudence."

Plaintiffs urge that the Constitution of California (article I, section 1) declares that among the inalienable rights guaranteed to all persons is the right of ". . . acquiring, possessing and protecting property." But these rights not only include the right to acquire and possess property but also the right to dispose of it freely (Tennant v. John Tennant Memorial Home, 167 Cal. 570, 575) and in any way not forbidden by law (People v. Davenport, 21 Cal. App.2d 292, 295-296). Certainly the constitutional right to own and possess property includes the right to sell to one of the owner's own choice subject only to a valid exercise of the police power for the protection of all the people. Never to my knowledge has article I, section 1, of our state Constitution been construed to give any per- [fol. 116] son the right to acquire property from another who did not wish to sell it to him, however arbitrary his reasons might be. Section 1 of article I, when read with section 26, now means exactly what it meant prior to the adoption of legislation (the Unruh and Rumford Acts, *supra*) conferring a right to acquire property in certain instances without discrimination on grounds of race or religion. It is, therefore, erroneous for plaintiffs to say that the effect of section 26 is to "take from negroes but not from whites, some part of the inalienable rights granted by section 1." Under section 26 all persons of all races and creeds have exactly the same rights they have always had under section 1 in the absence of legislation and, to the extent any rights are restricted by section 26, such restrictions are applicable to *all* persons.

As I view it, the philosophy and rationale of article I, section 26, is epitomized by Mr. Justice Black, long an exponent of an expansive interpretation of the guarantees of the Fourth Amendment, when writing for himself and Justices Harlan and White in the dissent filed in the case of Bell v. Maryland (1964) 378 U.S. 226, 330-331 [84 S.Ct. 1814, 12 L.Ed.2d 822, 858] wherein he said: ". . . the line of cases from *Buchanan* through *Shelley* establishes these propositions: (1) When an owner of property is willing [fol. 117] to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to 'inherit, purchase, lease, sell, hold and convey' property, prohibits a State, whether through its Legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties. *Shelley* v. *Kraemer, supra,* 334 U.S., at 19 [92 L.Ed. at 1183, 3 A.L.R.2d 441]. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership: 'the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.' (*Buchanan* v. *Warley, supra,* 245 U.S., at 74 [62 L.Ed. at 161, L.R.A. 1918C 1201]). *This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principles stated in Buchanan and Shelley protect this right. But equally, when one party is unwilling, as when the property owner chooses NOT to sell to a particular person or NOT to admit that person,* as this Court emphasized in *Buchanan,* he is entitled to rely on the guarantee of due process of law, that is 'law of the land,' to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant [fol. 118] to some constitutional grant of power, can anyone disturb this free use." (Emphasis added.)

As to the view of the majority that affording a property owner judicial recognition and enforcement of his

property rights in the sale or leasing of residential property, on the ground that his motives in selling or leasing were based upon race, color or creed, spells out significant state involvement is not, I submit, supported by statutory or decisional law. This I say because such denial, *in the absence of a valid regulatory statute,* would deprive such an owner of his property without due process of law because a property owner, as heretofore pointed out, has a constitutionally protected right to use and dispose of his property in whatever manner he wishes, not inconsistent with valid legislation. (Buchanan v. Warley (1917) 245 U.S. 60 [62 L.Ed. 149]; Richmond v. Deans (1930) 281 U.S. 704 [74 L.Ed. 1128].)

In other words, since section 26 does not otherwise offend the Fourteenth Amendment, the mere recognition or enforcement by a court of—for instance—the termination of a month-to-month tenancy in accordance with its terms does not render the state responsible for the motives of the landlord.

[fol. 119] In the instant case it is clear that section 26 has effectively repealed inconsistent portions of the Unruh and Rumford Acts, *supra.* Plaintiffs are, therefore, in the position of demanding that the courts refuse to recognize or actually prohibit conduct by defendants which is not now proscribed by any legislation.

When the Legislature adopted the Unruh, Hawkins and Rumford Acts, it was making a choice to impose sanctions upon certain owners of certain types of residential property if they refused to sell or lease it upon grounds of race, color, creed or national origin of the prospective purchasers. Certainly it cannot logically be contended that the Legislature would be barred from repealing those portions of the aforesaid statutes directing sanctions at private property owners in dealing with their own property and substitute therefor another program. If the Legislature has such discretion, then under the Constitution of this state, it cannot fairly be said that the people do not.

I am persuaded that none of the types of state involvement which have been held sufficient to invoke the Fourteenth Amendment in the cases relied upon in the majority opinion can be found in the California amendment here under attack. In fact, the very essence of section 26 is to remove the influence of the state from the formulation of [fol. 120] private decisions affecting the sale or rental of privately owned residential property.

Plaintiffs seemingly contend and the majority opinion infers that all conduct which the state has the power to prohibit but which it does not prohibit is conduct for which the state is responsible for Fourteenth Amendment purposes. However, the Supreme Court of the United States has consistently and without exception preserved the fundamental and long recognized principle that the Fourteenth Amendment does not reach private conduct however arbitrary or unenlightened it may be except only where such private conduct involves the performance of a traditional governmental or public function such as the conducting of elections, government of a town, the furnishing of public services under a monopoly granted by government, private zoning through restrictive covenants or operation of municipal parks. There is no suggestion in the cases now before us that the residential property involved is or ever has been owned, operated, financed or maintained by a governmental entity. Here the property is private residential property owned, operated and maintained by the private persons who were defendants in the court below.

Accordingly, the precise holding of the Supreme Court of the United States in the recent case of Evans v. Newton [fol. 121] (1966) —— U.S. ——, 34 U.S.L.Week 4078, based as it was on the continued municipal operation and maintenance of the property devoted to public use as a park, affords no comfort or support whatever to the attack on section 26. Just as the statute in Burton v. Wilmington Parking Authority, 365 U.S. 715, 6 L.Ed.2d 45, could not provide the basis for a violation of the Fourteenth Amend-

ment, so also section 26 does not provide the basis for a judgment that plaintiffs' constitutional rights have been violated.

Admittedly, since government is not an exact science, one of the important factors deserving consideration concerning existing evils and the remedy therefor is prevailing public opinion. This is especially true when such public opinion has been reached after mature deliberation and is both deep-seated and widespread. By an overwhelming margin of popular votes, the people of California have made the same choice on the issue before us as has been made in 32 of our sister states, and our state still has more extensive regulations against racial discrimination than exist in 41 states of the union.

To analyze in detail the recent U.S. Supreme Court decision in Evans v. Newton, *supra,* would unduly prolong this already lengthy dissenting opinion. Suffice it to say that it is the most recent of a long line of United States [fol. 122] Supreme Court decisions dating from the *Slaughter-House* cases in 1873 and *Civil Rights* cases in 1883 in which that court has steadfastly limited the sphere of the Fourteenth Amendment to conduct of the state or conduct for which the state can fairly be held responsible. In an unbroken line of decisions that court has uniformly reiterated the principle that individual invasion of individual rights is beyond the regulatory ambit of the Fourteenth Amendment.

I do not justify discriminatory private conduct nor approve the state's failure to forbid it, but I submit it is not the province of this court by judicial fiat to enact legislation, a function reserved to the People or the Legislature.

As was stated by Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Douglas, in Bell v. Maryland, *supra* (1964) 378 U.S. 226 at p. 313 [12 L.Ed.2d 822], arguing for a federal right to equal access to public accommodations which the state may not infringe by judicial action against trespassers: *"Prejudice and bigotry in any form are regrettable, but it is the constitutional right of*

every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association [fol. 123] *are themselves constitutionally protected liberties.*" (Emphasis added.)

Discrimination because of race or religion, political beliefs or other irrational grounds influences the conduct of individuals and society in many ways with as many effects. In virtually all but the *artificially framed racial* test case, such discriminations will, if present, be but one of many motivating factors. This, because we must realize that an innate quality of our very nature is that of selectivity. It manifests itself in our human behavior from the time we attain the use of reason practically until we draw our final breath. If, as conceded by plaintiffs in their briefs and at the oral arguments, and recognized in the majority opinion, we may be selective in choosing our associates in clubs, fraternal organizations, social intimates and business partners because of social or religious prejudice, then by what force of logic or justice should the state be permitted to assert its coercive powers to take from the individual property owner the decision as to who shall be admitted to that property as a resident neighbor or to whom the owner thereof may sell it, save by the law of the land? Yet, this is exactly what the state would be doing in denying to a [fol. 124] property owner judicial recognition and enforcement of his private contract and property rights upon the ground that his motives in seeking judicial relief are based upon race, color or creed. By reason of the repeal of certain provisions of the Rumford and Unruh Acts by the enactment of section 26, there is no valid existing regulatory statute depriving an owner of residential property of absolute discretion in the sale or rental thereof. Therefore, since a property owner has a constitutionally protected right to dispose of and use his property in whatever manner he wishes *not inconsistent with valid legislation*, to deny such owner judicial relief would deny to him the

equal protection of the laws in violation of the First, Third, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

The majority opinion relies upon the case of Shelley v. Kraemer, 334 U.S. 1 [92 L.Ed. 1161] as being analogous to the one with which we are here concerned. In *Shelley*, property subject to a racially restrictive covenant had been conveyed by a white owner to a Negro. Owners of a nearby property instituted an action to restrain Shelley, the Negro buyer, from taking possession, and to have title revested in the grantor. This case involved a "willing seller—willing buyer" relationship, and judicial enforcement of the [fol. 125] restrictive covenant would have compelled the sellers to discriminate against their wishes. If the *Shelley* case stands for anything, it stands for the philosophy of section 26, by sustaining the freedom of sellers to select whomsoever they choose to buy their property, notwithstanding racial covenants. The key to both *Shelley* and Barrows v. Jackson, 346 U.S. 249 [97 L.Ed. 1586, 73 S.Ct. 1031] (affirming Barrows v. Jackson, 112 Cal.App.2d 534), where the courts refused to recognize a right to damages in neighboring property owners seeking recovery after breach of a racially restrictive covenant by a willing seller to a minority group buyer, is that, were the courts to give recognition to such a cause of action they would not be acting neutrally but actually would be compelling discrimination by a seller who did not wish to discriminate.

Neither case supports the proposition that a state court would have been under a constitutional mandate to compel an owner to sell to a Negro if he preferred to adhere voluntarily to his restrictive agreement. Indeed, the court in *Shelley* expressly concluded "that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment." (334 U.S. at p. 13.) Later it noted that "*these are cases in which the States have made available to* [fol. 126] *such individuals the full coercive power of government to deny to petitioners, on the grounds of race or*

color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." In short, "but for the intervention of the state courts, . . . petitioners would have been free to occupy the properties in question without restraint." (334 U.S. at p. 19.) (Emphasis added.)

Plaintiffs' arguments and the majority opinion based on the *Shelley* case simply do not apply to the cases now before this court where an unwilling seller or lessor is involved. As pointed out in *Shelley*, the court there was asked to enforce an agreement which denied to members of one race rights of acquisition, ownership, occupancy and disposition of property rights that were enjoyed as a matter of course by other citizens of a different race or color. Article I, section 26, of the California Constitution, now before us, applies to property owners without regard to race or color and, accordingly, the conduct condemned in the foregoing cases is not present here.

In support of its holding that a discriminatory act even where the actor is a private citizen motivated by purely personal interests, may fall within the proscription of the equal protection clause if state or local government or the [fol. 127] purpose of state or local government is significantly involved, the majority opinion herein cites the case of Burton v. Wilmington Parking Authority (1961) 365 U.S. 715, 722 [6 L.Ed.2d 45]. This is a leading example of those cases presenting circumstances in which the state has leased state facilities either in whole or in part to a private person or group for carrying on activities or offering services to the public which the government may, but is not obligated to provide.

In *Burton*, the court found significant state involvement in restaurant discrimination because the land and building were publicly owned and had been acquired for "public use." The premises were leased to a private operator but as a part of a publicly owned parking lot where the rental income from the restaurant was necessary for the financial stability of the parking operation.

The *Burton* case and those akin to it simply hold that if a state undertakes to provide or contribute to providing these services, it must obey the strictures of the Fourteenth Amendment, whether the state itself operates the facilities or limits its activities to leasing or financing the facilities operated by private persons but performing the same services.

[fol. 128] None of the elements of state involvement present in the *Burton* case—the "white primary" cases where the holding was that the state could not escape the provisions of the Fourteenth Amendment by delegating to a private agency functions which were inherently governmental in character; or the so-called "sit-in" cases involving either municipal ordinances requiring racial discrimination, where the court emphasized that it *was not* confronted with a private policy of discrimination or with mere enforcement by a state court of a state criminal trespass statute, but where the state invoked the statute to promote racial discrimination—is possible under the California constitutional provision here under attack. The very essence of section 26 is to avoid state involvement in private decisions in the sale or rental of privately owned residential property.

Plaintiffs rely on the case of Abstract Investment Co. v. Hutchinson, 204 Cal.App.2d 242, cited in the majority opinion. In this case, the District Court of Appeal reversed a judgment for the plaintiff in an unlawful detainer action on the ground that the trial court had erred in refusing to admit evidence in support of certain affirmative defenses which alleged that plaintiff was terminating the tenancy solely because of the Negro defendant's race. As indicated by excerpts on pages 247 through 251 of the *Abstract* case, [fol. 129] the court was holding that under the law *as it then existed* racial discrimination was a ground for a court refusing to entertain or sustain a complaint for unlawful detainer because racial discrimination was contrary to the public policy declared inter alia in our state Constitution and in the Unruh and Hawkins Acts adopted by our state Legislature.

The extent of the significance attached by the District Court of Appeal to these state laws is reflected in its extensive discussion at pages 251 through 255 of the opinion concerning the constitutionality and applicability of these statutes.

To the extent that the court in *Abstract* relied upon state antidiscrimination legislation it should not be applied to cases such as the instant one involving as it does the leasing of residential property because of non-regulation by the state embodied in section 26. Likewise, to the extent *Abstract* was based upon the public policy provisions of the state Constitution, the holding was overruled by the adoption of section 26, here under attack insofar as the sale or leasing of residential property is concerned.

As I view it, another important issue presented to us is whether in the several states a person has a right of action [fol. 130] under the Fourteenth Amendment to obtain judicial relief against another person who refuses on grounds of race to deal with him in the sale or leasing of private residential property. If he has such a right of action, then I agree that neither section 26, nor any statute, decision of any court, nor any vote of the electorate can properly deny it.

Also, I certainly agree that conduct based on racial prejudice is injurious, that it is irrational, uncharitable, unenlightened and arbitrary. What I disagree with is the essential foundation of plaintiffs' claim that racial discrimination practiced by private owners of private residential housing is directly forbidden by the Fourteenth Amendment. However delicately or artfully plaintiffs phrase the problem, whether in terms of "state responsibility" for not prohibiting what it has the power to prohibit, or of "abdication of state responsibility" or of "purposefully permitting," "authorizing" or "encouraging" discriminatory conduct, none of these words is so magic as to obscure the plain fact that the only conduct which has injured these plaintiffs is the conduct of private citizens with respect to their own private residential prop-

erty. I submit the state cannot fairly be held responsible for that conduct unless it has a duty under the Fourteenth [fol. 131] Amendment to prohibit such conduct, and that a state has that duty only if the Fourteenth Amendment contains a self-executing cause of action for racial discrimination in private housing.

No single case relied upon by plaintiffs or cited in the majority opinion holds or even suggests that there is such a cause of action under the Fourteenth Amendment. On the contrary, the authorities are unanimous in holding that no such federal constitutional cause of action now exists, that the Fourteenth Amendment does not extend and that sound reasons forbid its extension to the private conduct here involved.

Furthermore, recourse to the legislative history and debates in the Congress at the time the Fourteenth Amendment was under consideration clearly establishes that the amendment was designed to correct the unjust legislation of some of the states to the end that the law which operates upon one man shall operate equally upon all. This legislative history indicates that the purpose of the amendment was to prohibit *state* legislation such as was adopted in some of the states following the Civil War preventing Negroes from purchasing or leasing land, buying or selling other property or even making contracts precisely as by the federal Constitution, a state is forbidden to pass an "ex post facto law."

[fol. 132] The Thirteenth Amendment had just been adopted inhibiting slavery but leaving the freedom of the emancipated people in the power of the states. Hence the necessity of the prohibition to the states. By the very language of the amendment it is manifest that its entire structure rests on the discrimination made by laws of the various states.

In an area concerned solely with the rights and obligations of citizens toward each other, the people have a right either directly or through their elected representatives to regulate that kind of conduct or not to regulate it.

The adoption of section 26 of the Constitution of California evidences the decision of the people not to regulate such conduct in the sale or leasing of private residential property and extends such freedom of action to all persons, unrestricted by racial or religious barriers.

I would affirm the judgment.

White, J.*

[fol. 133]

DISSENTING OPINION, MCCOMB, J.

I concur with the views expressed by Mr. Justice White in his dissenting opinion.

The people of California, under the legislative power reserved to them (Cal. Const., art. IV, § 1)[1] have, by enacting section 26 of article I, guaranteed to all persons, regardless of race, color or religion, equal rights in their property.

Every person, regardless of his race, color or religion, as an incident of the right to own, possess and enjoy real property, has the right to sell or lease, or to decline to sell or lease, his property to anyone regardless of the race, color or religion of the person with whom he is dealing.

[fol. 134] Unless we are to become a socialistic state in which the people have only limited, if any, rights to privately own, possess, enjoy and/or dispose of property, real or personal, the proposed decision is obnoxious to our basic form of government.

The people of California, by enacting section 26, article I, of the Constitution, have made it altogether clear that

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* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

[1] Article IV, section 1, reads: "The legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature."

they wish to retain the right to own, possess and enjoy private ownership of property.

By its decision, our court has effectively nullified the will of the people, from whom it derives its power.

I completely disagree with the majority that the subject enactment encourages discriminatory conduct. To me, section 26 is a restatement of a fundamental principle that all property owners have a right to enjoy or to dispose of their property in any lawful manner, in their absolute discretion.

McComb, J.

[fol. 135]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. 28422

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Plaintiffs and Cross-Defendants, Respondents,

vs.

CLARENCE SNYDER, Defendant and Cross-Complainant, Appellant.

Excerpts From Clerk's Transcript

Appeal from the Superior Court, Los Angeles County.

Honorable Martin Katz, Judge.

APPEARANCES:

Messrs. A. L. Wirin and Fred Okrand, 257 South Spring Street, Los Angeles, California 90012, Counsel for Respondents.

Messrs. Gibson, Dunn & Crutcher and Samuel O. Pruitt, Jr., 634 South Spring Street, Los Angeles, California 90014, Counsel for Appellant.

[fol. 136]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Plaintiffs,

v.

CLARENCE SNYDER, Defendant.

COMPLAINT FOR INJUNCTION—Filed December 23, 1964

Plaintiffs allege:

I

Plaintiffs Wilfred J. Prendergast and Carola Eva Prendergast are husband and wife. Plaintiff Wilfred Prendergast is a Negro. Plaintiff Carola Prendergast is a Caucasian. They bring this action on behalf of themselves and all persons similarly situated, namely, persons who are discriminated against by defendant because of their race or the race of their spouses by the policy of defendant as hereinafter set forth.

II

Defendant Clarence Snyder is the owner of that certain apartment known as 8604 Burton Way, Los Angeles, California. Said apartment is one of a seven apartment unit having the addresses 8602-8612 Burton Way, Los Angeles, [fol. 137] California, owned by defendant and rented by him to tenants.

[File endorsement omitted]

III

On or about July 13, 1964, defendant, through Mrs. Margaret Keefer, a Realtor with offices at 842 S. Robertson Blvd., Los Angeles, California, acting as agent of and for and on behalf of defendant, rented to plaintiffs the apartment described in Paragraph II hereof, and a garage for use in connection therewith. The negotiations were conducted between Mrs. Keefer and plaintiff Carola Prendergast. At the time of the renting, plaintiff Carola Prendergast advised Mrs. Keefer, and Mrs. Keefer, as agent for and on behalf of defendant, knew that her, plaintiff Carola Prendergast's, husband was working in San Francisco, California and would join her to live in the apartment as soon as he received a transfer from his employer to come to Los Angeles. At the time of the renting, defendant nor his agent, Mrs. Keefer, did not know that plaintiff Wilfred Prendergast was a Negro.

IV

Plaintiffs, at all times herein have paid the rent on time. Until the times mentioned below, plaintiff Carola Prendergast occupied the apartment alone.

V

During the month of October, 1964, plaintiff Wilfred Prendergast was temporarily in Los Angeles and stayed at the above mentioned apartment. While there, he met the said Mrs. Keefer while she was collecting the rent, was introduced to her by plaintiff Carola Prendergast as the husband of plaintiff Carola Prendergast and the said Mrs. Keefer saw that plaintiff Wilfred Prendergast is a Negro.

VI

In November, 1964, plaintiff Wilfred Prendergast moved to Los Angeles and into the said apartment where, since that time, he has been and is now living with his wife.

[fol. 138]

VII

Thereafter defendant caused to be served on plaintiffs a Notice to Quit, dated December 1, 1964, demanding that plaintiffs quit and deliver up possession of the said apartment to defendant on December 31, 1964. Said Notice to Quit is referred to herewith, incorporated herein as though fully set forth and a copy thereof attached hereto as Exhibit "A".

VIII

By letter dated December 7, 1964 and sent by registered mail, plaintiffs requested of defendant, through his agent Mrs. Keefer, that they be given reasons in writing as to why they were being required to quit the premises. Said letter and the return receipt signed by Mrs. Keefer are referred to herewith, incorporated herein as though fully set forth and copies thereof attached hereto as Exhibit "B".

No reply has been received to said letter.

IX

The sole reason why defendant has served upon plaintiffs the Notice to Quit and is requiring plaintiffs to quit the premises is that plaintiff Wilfred Prendergast is a Negro.

X

Plaintiffs are informed and believe and therefore allege that the reason defendant did not serve a Notice upon them to quit the premises prior to the said December 1, 1964 notice is because of the requirements of California Civil Code Sections 51 and 52 which prohibited him from so doing, but that following the addition of Article I, Section 26 to the California Constitution (Proposition 14 on the ballot of November 3, 1964 California General Election) he served said notice. Plaintiffs are further informed and be-

lieve and therefore allege that defendant now has the policy and intends to maintain that policy as a practice, not to rent or permit occupancy of any of the apartments in the apartment building described in Paragraph II hereof by Negroes.

[fol. 139]

XI

Unless restrained by this Court, defendant will cause plaintiffs to be evicted from the said premises and will refuse to rent to other persons solely because they are Negroes.

XII

Plaintiffs have no plain, speedy or otherwise adequate remedy at law. The remedy of damages will not make them whole for the loss suffered by them in being required to move from the home in which they desire to live nor will it allow them to live in the home of their choice.

Wherefore, plaintiffs pray:

1. For a preliminary injunction, pending final determination of this case, restraining and enjoining defendant and his agents from, pursuant to the Notice to Quit dated December 1, 1964, or by reason of plaintiff Wilfred Prendergast's race, evicting plaintiffs from the premises at 8604 Burton Way, Los Angeles, California, and from engaging in the practice of discrimination because of race in the rental of apartments in the apartment building at 8602-8612 Burton Way, Los Angeles, California.

2. For a permanent injunction restraining and enjoining defendant and his agents from, pursuant to the Notice to Quit dated December 1, 1964 or by reason of plaintiff Wilfred Prendergast's race, evicting plaintiffs from the premises at 8604 Burton Way, Los Angeles, California, and from engaging in the practice of discriminating because of race in the rental of apartments in the apartment building at 8602-8612 Burton Way, Los Angeles, California.

3. For costs of suit incurred herein.

4. For such other and further relief as to the Court may seem just and proper.

A. L. Wirin, Fred Okrand, Attorneys for Plaintiffs.

O/s

[fol. 140] EXHIBIT "A" TO COMPLAINT

NOTICE TO QUIT

To Mr. and Mrs. Wilfred Pendergast Tenant in Possession. TAKE NOTICE, that you are hereby required to quit, and deliver up to the undersigned the possession of the premises now held and occupied by you, being the premises known as 8604 Burton Way Los Angeles, 49, Calif. at the expiration of 30 Days commencing on the 1st day of December, 1964 and ending on the 31st day of December, 1964.

THIS IS INTENDED as a 30 Day notice to quit, for the purpose of terminating your tenancy aforesaid.

DATED this 1st day of December, 1964

/s/ CLARENCE SNYDER
Landlord.

/s/ MARGARET KEEFER
Agent.

[fol. 141] EXHIBIT "B" TO COMPLAINT

December 7th, 1964

M. Keefer—Realtor
842 S. Robertson Blvd.
Los Angeles, Calif.

Re: Your "NOTICE TO QUIT" dated December 1st, 1964.

Dear Mrs. Keefer:

We hereby request that you submit to us, in writing, within five (5) days, your reason or reasons for requiring us to quit the premises now held and occupied by us at 8604 Burton Way, Los Angeles, Calif.

Very sincerely,

W. Prendergast
8604 Burton Way
Los Angeles, Calif.

Via Registered Mail
12-7-64

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Deliver *ONLY* to addressee ☐ Show address where delivered

(Additional charges required for these services)

RECEIPT

Received the numbered article described on other side.

SIGNATURE OR NAME OF ADDRESSEE (must be always filled in)
/s/ M. KEEFER

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED
Dec 8 1964

SHOW WHERE DELIVERED *(only if requested)*

[fol. 142]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[Title omitted]

ORDER TO SHOW CAUSE—Filed December 23, 1964

Upon the reading and filing of the verified complaint herein, and good cause appearing therefor, It Is Hereby Ordered, that defendant Clarence Snyder, show cause in Department 65 of this Court, 111 North Hill Street, Los Angeles, California, at the hour of 9:30 a.m. on Jan. 8 1965, why a preliminary injunction, pending final determination of this case, should not be issued restraining and enjoining him and his agents from evicting plaintiffs, Wilfred J. Prendergast and Carola Eva Prendergast, pursuant to Notice to Quit dated December 1, 1964, or by reason of plaintiff Wilfred Prendergast's race, from the premises at 8604 Burton Way, Los Angeles, California and from engaging in the practice of discriminating because of race in the rental of apartments in the apartment building at 8602-8612 Burton Way, Los Angeles, California.

Dated: December 23, 1964.

Harold F. Collins, Judge, Superior Court.

O/s

[File endorsement omitted]

[fol. 143]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. 851,387

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Plaintiffs,

vs.

CLARENCE SNYDER, Defendant.

CLARENCE SNYDER, Cross-Complainant,

vs.

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Cross-Defendants.

NOTICE OF MOTIONS OF DEFENDANT AND CROSS-COMPLAINANT FOR SUMMARY JUDGMENT—Filed January 27, 1965

To The Plaintiffs And Cross-Defendants Herein And Their Attorneys Of Record, A. L. Wirin And Fred Okrand:

You And Each Of You Will Please Take Notice that on February 17, 1965 in Department 65 of the above-entitled Court at the hour of 9:00 A.M. or as soon thereafter as counsel may be heard, Defendant and Cross-Complainant will move the Court for summary judgment dismissing the said Complaint herein and granting to Cross-Complainant the relief prayed for in said Cross-Complaint.

[File endorsement omitted]

[fol. 144] Said motions will be made and based upon the grounds:

1. That the action set forth in the Complaint herein has no merit in that defendant is entitled as a matter of law, to a judgment of dismissal of the same.

2. That there is no defense to the action set forth in the said Cross-Complaint and that Cross-Complainant is entitled as a matter of law to a judgment against Cross-Defendants in accordance with the prayer of said Cross-Complaint.

3. There is no triable issue of fact material to the grounds for said motions as hereinabove set forth.

Said motions will be made and based upon this Notice of Motion, upon the verified Cross-Complaint herein, upon the Declaration of Defendant and Cross-Complainant filed concurrently herewith, upon a brief to be filed herein in support of said motions and upon all the papers and records on file herein.

Dated: January 27, 1965.

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., By Samuel Pruitt, Jr., Attorneys for Defendant and Cross-Complainant.

[fol. 145]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. 851,387

[Title omitted]

DECLARATION OF CLARENCE W. SNYDER

I, Clarence W. Snyder, do hereby declare under penalty of perjury that the following is true and correct:

1. I am the defendant and cross-complainant in this action. I know the facts set forth in this declaration and in

the cross-complaint herein and if called as a witness could testify competently thereto.

2. As an investment, the subject Burton Way property has hardly paid its own way. In 1963, our Rental Income was $7,575.00 while our required cash payments were $8,585.40, leaving a cash deficiency of $1,010.40. In 1964 our Rental Income was $5,815.00 and our required cash payments $7,968.10, leaving a cash deficiency of $2,153.10. I refer to and by this reference incorporate herein as though set forth in full Schedules A and B below. These schedules are an accurate breakdown of the rentals received and expenditures made in connection with the Burton Way property for the years 1963 and 1964, respectively.

[fol. 146] 3. The apartment building has one apartment which rents for $110 a month, three which rent for $100 a month, two which rent for $90 a month, and one (sometimes referred to as a half unit or bachelor apartment) which rents for $65 a month. At full occupancy and at the present rates, the gross rentals are $655 a month.

4. The tenants occupying the bachelor apartment, one of the $90 a month apartments, and one of the $100 a month apartments, all under month-to-month tenancies have all told us that they will vacate their apartments if the Prendergasts do not leave. If these tenants do vacate, our Rental Income will be cut by $255 a month until the apartments can be filled again. Our past experiences have indicated that it is reasonable to anticipate that it will take at least five months to fill each of these apartments. With the Burton Way apartment already in a negative cash position, so many prolonged vacancies would cause me severe economic loss and would make it impossible for me to continue to meet the expenses and mortgage payments set forth in the schedules which follow.

Schedule A

1963

Rental Income		$7,575.00
Expenses		
Utilities	$ 217.62	
Auto Expense	120.00	
Property Management	423.25	
Gardening	257.75	
Mortgage Interest	1,593.57	
Taxes	1,226.02	
[fol. 147]		
Insurance	200.41	
License and Permits	22.00	
Rug and Furniture Cleaning	42.06	
Repairs, Plumbing and Heating	387.45	
Electric	37.16	
Painting	216.71	
Furniture and Hardware	123.97	
Roofing	899.00	
Maintenance and General Repair	212.00	
	$5,978.97	
Mandatory Principal Mortgage Payments	2,606.43	
		8,585.40
Cash Deficiency		($1,010.40)

Schedule B

1964

Rental Income		$5,815.00
Expenses		
Utilities	$ 217.74	
Auto Expense	105.00	
Property Management	428.75	
Gardening	250.00	
Mortgage Interest	1,124.85	
Taxes	1,250.58	
Insurance	185.00	
License and Permits	22.00	
Rug and Furniture Cleaning and Repair	145.00	
Plumbing	84.25	
[fol. 148]		
Electric	8.70	
Painting	571.00	
Maintenance and General Repair	288.00	
Tile Repairs	105.00	
Doors and Windows	107.08	
	$4,892.95	
Mandatory Principal Mortgage Payments	3,075.15	
		7,968.10
Cash Deficiency		($2,153.10)

Executed this 13th day of January, 1965, in the City of Los Angeles, County of Los Angeles, State of California.

Clarence W. Snyder

[fol. 149]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. 851,387

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Plaintiffs,

vs.

CLARENCE SNYDER, Defendant.

CLARENCE SNYDER, Cross-Complainant,

vs.

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated, Cross-Defendants.

CROSS-COMPLAINT FOR DECLARATORY RELIEF—
Filed January 27, 1965

Defendant and Cross-Complainant Clarence W. Snyder [hereinafter "Cross-Complainant"] hereby alleges:

1. Cross-Complainant is and at all times material hereto has been an owner of that certain six and one-half unit apartment building having the addresses 8602-8612 Burton Way, Los Angeles, California, which building includes that certain apartment known as 8604 Burton Way, Los Angeles, California.

2. Cross-Defendants are presently residents of the county [fol. 150] of Los Angeles and are occupying the apartment known as 8604 Burton Way, Los Angeles, California.

[File endorsement omitted]

3. Cross-Defendants Wilfred J. Prendergast and Carola Eva Prendergast are husband and wife. Cross-Defendant Wilfred J. Prendergast is a Negro. Cross-Defendant Carola Eva Prendergast is a Caucasian. They are served and sued herein on behalf of themselves and all persons similarly situated, namely, persons who are or claim to be discriminated against by Cross-Complainant because of their race or the race of their spouses by the policies adopted by Cross-Complainant in the management of the apartment building referred to above.

4. Cross-Complainant and his wife purchased the apartment building referred to herein as an investment and to occupy one of the apartments as a future home. It was and is their intention to move into said property as soon as they can obtain a manager for another property they own. Accordingly, they have always felt it most important that the tenants in the building should be selected so that they will be able to live together harmoniously and consist of only such persons as Cross-Complainant would desire to have as neighbors.

5. Cross-Defendants took possession of the apartment they now occupy under a month-to-month tenancy commencing August 1, 1964. Cross-Defendant Carola Eva Prendergast has occupied said apartment since on or about August 1, 1964, and Cross-Defendant Wilfred J. Prendergast has occupied said apartment since in or about November, 1964.

6. Cross-Complainant exercised the right conferred on him by Section 1946 of the California Civil Code, namely, the right to terminate the monthly tenancy of Cross-Defendants, by serving on them a Notice to Quit, dated December 1, 1964, demanding that Cross-Defendants quit and deliver up possession of said apartment to Cross-Complainant on December 31, 1964. A true and correct [fol. 151] copy of said Notice to Quit is attached hereto, marked Exhibit "A", and incorporated herein by reference.

7. Prior to the termination of the tenancy of Cross-Defendants, as hereinabove alleged, Cross-Complainant was

advised by tenants of three of the remaining six apartments in the subject apartment building that each of them would exercise their rights to terminate their month-to-month tenancies if Cross-Complainant did not terminate the tenancy of Cross-Defendants because said other tenants did not desire to live in the same apartment building with Cross-Defendants.

8. Cross-Complainant does not desire to live in the subject apartment building so long as Cross-Defendants occupy the subject apartment and at the present time Cross-Complainant does not desire to rent any of said apartments to Negroes.

9. Cross-Complainant terminated the subject tenancy in the exercise of what he believed to be his rights (1) to select the persons with whom he would associate both in the continuing relationship of landlord and tenant and in the relationship of neighbors under the same roof, and (2) to acquire, use, enjoy and dispose of his property in any manner he may choose which is not prohibited by statute, ordinance or other legislation.

10. There exists an actual controversy between Cross-Complainant and Cross-Defendants over the existence, nature and extent of Cross-Complainant's right to terminate the tenancy of Cross-Defendants Prendergast and to regain possession of the apartment known as 8604 Burton Way, Los Angeles, California, in that Cross-Complainant contends and Cross-Defendants deny as follows:

A. There is no federal, state or local statute, ordinance or legislation which renders invalid or unlawful Cross-Complainant's termination of Cross-Defendants' monthly tenancy in the manner specified herein.

B. In the absence of a federal, state or local statute, [fol. 152] ordinance or legislation to the contrary, Cross-Complainant's refusal to permit any person or persons to become a tenant in his apartment building

or his termination in the manner provided by law of the tenancy of any person or persons in that building is not unlawful even if the unexpressed reason for such refusal or termination is the race or religion of such person or persons.

C. Cross-Defendants' monthly tenancy and right to occupy the apartment they continue to occupy has been lawfully terminated, and Cross-Complainant is entitled to immediate possession of the premises.

D. Cross-Complainant has a right to have a court of law recognize and enforce the termination of Cross-Defendants' tenancy in the manner set forth above and his right to regain possession of the premises formerly subject to said tenancy even if Cross-Complainant's sole reason for so terminating and for seeking such court recognition of the same were the race of Cross-Defendant Wilfred J. Prendergast.

Wherefore, Cross-Complainant prays that the Court make a Declaratory Judgment in accordance with the contentions of Cross-Complainant as set forth in paragraph 10 hereof, that Cross-Complainant recover his costs incurred herein, and have such other and further relief as may to the Court seem just and proper.

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., By Samuel O. Pruitt, Jr., Attorneys for Defendant and Cross-Complainant.

[fol. 153]

EXHIBIT "A" TO CROSS COMPLAINT

NOTICE TO QUIT

To Mr. and Mrs. Wilfred Pendergast

Tenant in Possession.

TAKE NOTICE, that you are hereby required to quit, and deliver up to the undersigned the possession of the premises now held and occupied by you, being the premises known as 8604 Burton Way Los Angeles, 49, Calif.

at the expiration of 30 Days commencing on the 1st day of December, 1964 and ending on the 31st day of December, 1964.

THIS IS INTENDED as a 30 Day notice to quit, for the purpose of terminating your tenancy aforesaid.

DATED this 1st day of December, 1964

/s/ CLARENCE SNYDER
Landlord.

/s/ MARGARET KEEFER
Agent.

[fol. 154]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[Title omitted]

DECLARATION OF MRS. MARGARET H. KEEFER—
Filed February 16, 1965

I, MRS. MARGARET H. KEEFER, do hereby declare under penalty of perjury that the following is true and correct:

[File endorsement omitted]

1. I have for many years been a realtor in the city of Beverly Hills. I am currently an active member in good standing of the Beverly Hills Realty Board.

2. Since the spring of 1961 I have been managing the seven unit apartment building known as 8602-8612 Burton Way, Los Angeles, California, for the owners, Mr. and Mrs. Clarence W. Snyder.

3. For about three and one-half years ending February 14, 1965, Mrs. Margaret O'Brian occupied the apartment in said building known as 8602 Burton Way.

4. On several occasions since the Prendergasts moved into the Snyder's building, Mrs. O'Brian has told me that if the Prendergasts did not leave, she would vacate. [fol. 155] Finally, on or about the first of February, 1965, Mrs. O'Brien told me that since the Prendergasts had not left, she was going to vacate her apartment on February 14.

5. On February 14, 1965, Mrs. Margaret O'Brien vacated her apartment.

6. The apartment vacated by Mrs. O'Brien has not been rented to any new tenant as yet, and I presently know of no persons interested in renting the apartment while the Prendergasts continue to occupy another apartment in the building.

7. The apartment known as 8610 Burton Way is now and for some time has been occupied by Mr. and Mrs. Charles Newton as tenants. Early in December, Mr. and Mrs. Newton telephoned me to complain about the Prendergasts. When they took their apartment they did not know that Mr. Prendergast was a Negro. Mrs. Newton told me at that time that they didn't know this was a neighborhood with so many colored people in it. She said there were many Negroes coming in and out of the Prendergast apartment, particularly on weekends, and that if the Prender-

gasts didn't leave, the Newtons would. She has repeated that statement on numerous occasions since that time.

8. On February 1, 1965, I received written notice from Charles Newton that he and his wife were vacating their apartment in the Snyder building as of March 1, 1965. They have told me that they are vacating the apartment because they don't want to live or have their friends know they live in a building occupied by Negroes.

9. I know of my own knowledge that all of the facts set forth in all of the preceding paragraphs are true and correct.

Executed this 16th day of February, 1965, in the city [fol. 156] of Los Angeles, county of Los Angeles, State of California.

Mrs. Margaret H. Keefer

[fol. 157]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Date: Mar. 15, 1965

Hon. Martin Katz, Judge, Helen Bennett, Deputy Clerk, J. Valley, Deputy Sheriff, Alma Ziegler, Reporter.

(Parties and counsel checked if present)

815937

THOMAS ROY PEYTON, M.D.

vs.

BARRINGTON PLAZA CORPORATION

851387

WILFRED J. PRENDERGAST, et al.

vs.

CLARENCE SNYDER

Counsel for Plaintiff

Saul S. Kreshek√ for plff Peyton

Counsel for Defendant

Malat and Malat and Ned B. Nelsen by Ned B. Nelsen√ for deft Barrington Plaza

MINUTE ENTRY OF MARCH 15, 1965

Plaintiff Thomas Roy Peyton's motion for preliminary injunction;

Defendant Barrington Plaza's Motion for Judgment on the Pleadings;

Plaintiff Wilfred J. Prendergast's Motion for Preliminary Injunction;

Defendant Clarence Snyder's Motion for Summary Judgment.

These matters having been submitted on March 3, 1964, the court now renders its decision, with all counsel present as shown above:

815937: Plaintiff Thomas Roy Peyton's motion for preliminary injunction is denied. Defendant Barrington Plaza's motion for Judgment on the Pleadings is denied as to counts 1 and 2, and granted as to count 3; ruling is deferred on count 4. Counsel for defendant Barrington Plaza Corporation is directed to prepare Judgment on the order granting motion for judgment as to count 3.

851387: Plaintiff Wilfred J. Prendergast's motion for preliminary injunction is denied. Defendant Clarence Snyder's motion for summary judgment is denied.

Helen Bennett

[fol. 158]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Plaintiffs,

vs.

CLARENCE SNYDER, Defendant.

MEMORANDUM OF DECISION—March 15, 1965

Plaintiffs, who are husband and wife, occupy an apartment under a month-to-month tenancy in a seven unit

[File endorsement omitted]

apartment building owned by defendant. Their tenancy commenced August 1, 1964, and on December 1, 1964, they were served with a 30 day notice pursuant to Section 1946 of the Civil Code requiring them to quit and deliver up possession of the premises to defendant. The sole reason for defendant's decision to terminate the tenancy was that plaintiff husband is a Negro.

This action was brought by plaintiffs to enjoin defendant landlord from evicting them because of race. Defendant has cross-complained for declaratory relief. He seeks a judicial declaration that plaintiffs' tenancy and right of occupancy has been lawfully terminated even if racial discrimination was the reason therefor, that defendant is entitled to immediate possession of the premises, and that he is entitled to have a court recognize and enforce termination of plaintiffs' tenancy and restoration of the premises to him even if he is motivated solely by racial prejudice.

Defendant made a motion for a summary judgment dismissing plaintiffs' action and granting him the relief requested in his cross-complaint. Affidavits have been filed indicating that another tenant has vacated her apartment and others will do so if plaintiffs remain because those tenants do not want to live in a building occupied by a [fol. 159] Negro, and projecting an economic loss to defendant if plaintiffs do not vacate the premises.[1] Defendant's motion for summary judgment, together with plaintiffs' application for a preliminary injunction, has been submitted for decision.

In opposition to defendant's motion and in support of their own, plaintiffs rely on the Unruh Civil Rights Act which, among other things, prohibits racial discrimination in the rental of real property in certain circumstances.[2]

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[1] The cross-complaint similarly alleges that although defendant intended to live in the building in the future, he does not want to do so if a Negro continues in occupancy.

[2] Civil Code, Sec. 51, provides: "All persons . . . . are free and equal, and no matter what their race, color, ... are entitled to

Defendant, in turn, relies upon Section 26, Article I, of the California Constitution,[3] which if valid, admittedly repeals the Unruh Act insofar as the latter imposes sanctions on [fol. 160] the owners of real property who discriminate on the basis of race or color in the rental thereof.[4] Defendant contends that there is now no statutory or common law cause of action in California against a property owner for his refusal to rent or to permit continued occupancy of his property, whatever his motives, and, accordingly, that there is no legal impediment to his evicting plaintiffs on grounds of race. Plaintiffs counter with the contention that Section 26 of Article I is invalid by reason of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[5] They further contend that judicial enforcement of defendant's decision to terminate plaintiffs' tenancy on racial grounds would deny

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the full and equal accommodations . . . . in all business establishments of every kind whatsoever." Section 52 states that "whoever denies . . . . or makes any discrimination . . . . on account of color, race . . . . contrary to the provisions of Section 51 . . . . is liable . . . . for damages.

Swann v. *Burkett*, 209 Cal. App. 2d 685, holds that an apartment building such as that involved herein is a "business establishment" within Section 51.

[3] "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly the right of any person, who is willing or desirous to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

Section 26, Article I, was known as Proposition 14 on the ballot at the last General Election.

[4] Other anti-discriminatory housing legislation, such as the Rumford Act (Health & Safety Code, Secs. 35700-35744), would also be repealed.

[5] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

plaintiffs rights guaranteed them by the Equal Protection Clause. Inasmuch as the latter contention has merit, it is unnecessary to consider the former.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits racial discrimination by the state, but it does not prohibit such offensive conduct by a private individual "unless to some significant extent the State in any of its manifestations has been found to have become involved in it." (Burton v. Wilmington Parking Authority, 365 U.S. 715; Peterson v. Greenville, 373 U.S. 244; Shelley v. Kraemer, 334 U.S. 1; Civil Rights Cases, 109 U.S. 3.) It has been held that the prohibited involvement occurs when a state court enforces the racial-discriminatory act of a private individual relating to occupancy of residential real property in cases where affirmative relief is sought in aid or furtherance of the discrimination. (Shelley v. Kraemer, supra; Barrows [fol. 161] v. Jackson, 346 U.S. 249; Abstract Investment Co. v. Hutchinson, 204 Cal. App. 2d 242; *cf.* In re Laws, 31 Cal. 2d 846; Clifton v. Puente, 218 S.W. 2d 272 (Texas); State v. Brown, 195 Atl. 2d 379 (Dela.).) *Abstract Investment Co.* v. *Hutchinson,* 204 Cal. App. 2d 242, specifically holds that judicial enforcement of the eviction of a tenant on racial grounds is prohibited by the Equal Protection Clause. There, a landlord commenced an unlawful detainer action to recover possession of premises leased to and occupied by a Negro under a month-to-month tenancy. The tenant's attempt to set up the defense that he was being evicted because of race was denied by the trial court. The District Court of Appeals reversed, holding that the tenant should have been permitted to show racial discrimination by his landlord "which if proven would bar the court from ordering his eviction because such 'state action' would be violative of" the federal Constitution. (Supra, p. 255).

It would seem that the decision in the *Abstract* case is determinative of the present case. However, defendant

contends that case is not controlling because, he claims, it represents an erroneous interpretation or misapplication of decisions of the United States Supreme Court in the restrictive covenant cases, principally *Shelley* v. *Kraemer*, 334 U.S. 1, and *Barrows* v. *Jackson*, 346 U.S. 249. Those cases held that the Equal Protection Clause interdicts judicial enforcement by state courts of restrictive covenants directed against use or occupancy of real property by non-Caucasians. The *Shelley* case involved an action in equity to enforce such a covenant by enjoining a Negro purchaser from occupying the purchased property. The *Barrows* case involved an action for damages against a white vendor for breach of covenant in selling to a Negro. Defendant argues that since the *Shelley* and *Barrows* cases involved willing sellers and buyers, judicial enforcement of the racial restrictive covenants therein would have compelled sellers [fol. 162] to discriminate against their wishes, and that the Supreme Court decisions in those cases must, therefore, be limited to situations where the 'state action' coerces the private decision to discriminate. The facts and language in Shelley and Barrows, as well as in subsequent cases, would appear to challenge the limitation contended for by defendant.[6] Although state action which coerces discrimination by private individuals in unquestionably prohibited,

[6] The private decisions to discriminate which were sought to be enforced in Shelley and Barrows long antedated the 'state action'. In *Shelley* v. *Kraemer*, the Court stated: "Here the particular patterns of discrimination and the areas in which restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement." The opinion in *Barrows* v. *Jackson*, 112 Cal. App. 2d 534, summarized Shelley v. Kraemer as follows: "The thrust of the decision is aimed at prohibition of judicial participation in the maintenance of racial residential segregation."

it appears that state participation in or active support of a prviate policy of racial discrimination, which participation or support does not have the effect of coercing the private decision to discriminate, is equally prohibited. (Burton v. Wilmington Parking Authority, 365 U.S. 715; Penn. v. Board of Trusts, 353 U.S. 230; Griffin v. Maryland, 378 U.S. 130; *cf.* Marsh v. Alabama, 326 U.S. 501; Cooper v. Aaron, 358 U.S. 1; Simkins v. Mose H. Cone Memorial Hospital, 323 F. 2d 959; Jackson v. Pasadena School District, 59 Cal. 2d 876.)[7]

[fol. 163] But regardless of whether or not the decision of the District Court of Appeal in *Abstract Investment Co.* v. *Hutchinson,* supra, is sound, this court is required to follow it in the absence of contrary decisions by state appellate courts of equal or greater authority or by the United States Supreme Court. No such state court decisions have been cited.[8] A number of recent decisions of the United States Supreme Court arising out of the "sit-in" demonstrations have been cited by defendant in support of his contention that judicial enforcement by state courts of private racial discrimination does not of itself constitute prohibited state action. The fact is that none of those decisions so hold. The cases relied upon are *Peterson* v. *Greenville,* 373 U.S. 244, *Lombard* v. *Louisiana,* 373 U.S.

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[7] In *Griffin* v. *Maryland,* supra, it was said: "The Board of Trust case must be taken to establish that to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment."

[8] *Housing Authority* v. *Cordova,* 130 Cal. App. 2d 883, which states by way of dictum that a landlord may refuse "to permit the continued occupancy of his premises by persons of a particular race," is an opinion of the Appellate Department of the Los Angeles Superior Court, and, does not discuss the constitutional question. *Hill* v. *Miller,* which holds that judicial enforcement of a tenant's eviction on grounds of race does not violate the Fourteenth Amendment, is an opinion of the Sacramento Superior Court, and, makes no reference, in this connection, to the *Abstract* case.

267, *Griffin* v. *Maryland*, 378 U.S. 130, and *Robinson* v. *Florida*, 378 U.S. 158, each of which reversed state criminal trespass convictions of persons who were denied service in or equal access to places of public accommodation and who refused to leave the private premises when requested. Although the state action condemned in each of those cases was legislative, executive or administrative,[9] no approval of the judicial activity was indicated. The [fol. 164] Supreme Court has expressly abstained from determining "whether the Fourteenth Amendment . . . . operates of its own force to bar criminal trespass convictions where . . . . they are used to enforce a pattern of racial discrimination" in places of public accommodation.[10]

Defendant's attempt to distinguish the *Abstract* case on the basis that it "could have been decided" on the ground that the conduct of the landlord therein was in violation of the Unruh Act must also fail. The opinion of the Dis-

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[9] In *Peterson* v. *Greenville*, supra, prohibited state involvement was found in the existence of a city ordinance which required segregation in eating places. In *Lombard* v. *Louisiana*, supra, public statements by city officials that attempts to secure desegregated service were not in the public interest and would not be permitted constituted the offending state action. In *Griffin* v. *Maryland*, supra, state participation or involvement resulted from enforcement of a private amusement park's policy of discrimination by an employee of the park who was also a deputy sheriff. In *Robinson* v. *Florida*, supra, regulations of the board of health requiring separate restroom facilities where white and colored persons were accommodated were held to have involved the state in the private discrimination.

[10] Hamm v. Rockhill, —— U.S. ——, 13 L. Ed 2d 300. See also Robinson v. Florida, 378 U.S. 158; Garner v. Louisiana, 368 U.S. 157; Bell v. Maryland, 378 U.S. 226. But see State v. Brown, 195 Atl 2d 379 (Dela).

It is true that three members of the Supreme Court, Justices Harlan, Black and White, are of the opinion that such convictions are permissible. See dissenting opinion of Justice Black in Bell v. Maryland, supra. But three other members, Chief Justice Warren, Justices Douglas and Goldberg, are of the contrary opinion. See concurring opinions of Justice Douglas and Justice Goldberg in Bell v. Maryland, supra.

trict Court of Appeal in that case expressly stated that it could not find "that the discrimination complained of constituted a violation of the Unruh Act." (204 Cal. App. 2d 242, 255)

Finally, defendant contends that to refuse judicial enforcement of a landlord's decision to terminate a tenancy because he is motivated by racial discrimination, would deny him due process and equal protection of the laws. A similar contention was rejected in *Shelley* v. *Kraemer* with the remark that "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." (Supra at p. 22; See also Barrows v. Jackson, supra; Abstract Investment Co. v. Hutchinson, supra at p. 251)

[fol. 165]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CONTINUATION OF PROCEEDINGS OF 3-15-65

Defendant's motion for judgment on the pleadings is granted as to count 4. The court further orders that the complaint be, and it hereby is dismissed without prejudice, and that the cross-complaint be, and hereby is, dismissed with prejudice. The clerk is ordered to file the judgment this date and have entered on the register of actions soon as possible.

Jack Franz

[fol. 166]

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., 634 South Spring Street, Los Angeles, California 90014, MAdison 0-9300, Attorneys for Defendant and Cross-Complainant.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. 851 387

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST on behalf of themselves and all persons similarly situated, Plaintiffs,

—vs.—

CLARENCE SNYDER, Defendant.

CLARENCE SNYDER, Cross-Complainant,

—vs.—

WILFRED J. PRENDERGAST, and CAROLA EVA PRENDERGAST on behalf of themselves and all persons similarly situated, Cross-Defendants.

JUDGMENT—March 31, 1965

The motions of defendant and cross-complainant for summary judgment on the Complaint and Cross-Complaint having come on regularly for hearing on March 3, 1965, in Department 62 of the above Court, the Honorable Martin Katz, Judge presiding, Messrs. Herman F. Selvin, A. L. Wirin, and Fred Okrand appearing for plaintiffs and cross-defendants and Messrs. Gibson, Dunn & Crutcher and Samuel O. Pruitt, Jr. appearing for defendant and cross-complainant, and the Court having considered the briefs

and arguments of counsel, and the parties having agreed [fol. 167] that there is no genuine issue as to any facts material to a disposition of the motions, and the Court being fully advised in the premises, having determined that Section 26 of Article I of the California Constitution is inapplicable to the issues raised by the Cross-Complaint herein and that to grant any relief on said Cross-Complaint would violate the Fourteenth Amendment to the United States Constitution and that said Cross-Complaint must therefore be dismissed with prejudice and the parties having agreed that the Complaint may be dismissed without prejudice, now therefore

It Is Hereby Ordered, Adjudged, and Decreed that the Complaint be, and it hereby is, dismissed without prejudice, and that the Cross-Complaint be, and it hereby is, dismissed with prejudice.

Martin Katz, Judge of the Superior Court.

Approved as to content and form without prejudice however to right to cross-complainant to appeal from said judgment:

Herman F. Selvin, A. L. Wirin, Fred Okrand, By Fred Okrand, Attorneys for Plaintiffs and Cross-Defendants.

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., By Samuel O. Pruitt, Jr., Attorneys for Defendant and Cross-Complainant.

[fol. 168]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[Title omitted]

NOTICE OF APPEAL—Filed April 1, 1965

To the Clerk of the above-entitled Court:

Please Take Notice that cross-complainant Clarence Snyder hereby appeals to the Supreme Court of California from the judgment of the Court dismissing the Cross-Complaint herein, entered April 1, 1965, and the whole thereof.

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., By Samuel O. Pruitt, Jr., Attorneys for Cross-Complainant and Appellant.

[File endorsement omitted]

[fol. 169]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST et al., Plaintiffs, Cross-defendants and Respondents,

v.

CLARENCE SNYDER, Defendant, Cross-complainant and Appellant.

OPINION—May 10, 1966

Defendant landlord appeals from a judgment for plaintiff tenants entered upon defendant's motion for summary judgment on his cross-complaint for declaratory relief.

[File endorsement omitted]

Plaintiffs Prendergast are husband and wife, respectively a Negro and a Caucasian. Prior to their marriage Mrs. Prendergast rented from defendant an apartment in his seven-unit dwelling on an oral, month-to-month tenancy. Mr. Prendergast moved into the apartment with his wife following their marriage, and defendant thereupon purported to terminate plaintiffs' tenancy in the exercise of his claimed right "(1) to select the persons with whom he would associate both in the continuing relationship of landlord and tenant and in the relationship of neighbors under [fol. 170] the same roof, and (2) to acquire, use, enjoy and dispose of his property in any manner he may choose which is not prohibited by statute, ordinance or other legislation."

The instant action was commenced by plaintiffs to enjoin defendant from evicting them by reason of plaintiff husband's race. In his cross-complaint defendant sought a declaration that his termination of the tenancy was not invalid, that defendant is entitled to possession of the premises, that his refusal to rent to any particular person or persons or terminate such rental would not be unlawful even if his unexpressed reason therefor was the race or religion of the person or persons involved, and that defendant has a right to have a court of law recognize and enforce the termination of plaintiff's tenancy. Defendant relies upon article I, section 26 of the Constitution, which provides in pertinent part: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

[fol. 171] The trial court, in a memorandum opinion, held that the Fourteenth Amendment, through the equal protection clause, proscribed discrimination based on race where directly practiced by a state and also if practiced by private persons where "to some significant extent the State

in any of its manifestations has been found to have become involved in it," citing Burton v. Wilmington Parking Authority, 365 U.S. 715, and Shelley v. Kraemer, 334 U.S. 1. The court then noted that "the prohibited involvement occurs when a state court enforces the racial discriminatory act of a private individual relating to occupancy of residential real property in cases where affirmative relief is sought in aid or furtherance of the discrimination. (Shelley v. Kraemer, *supra*; Barrows v. Jackson, 346 U.S. 249; Abstract Investment Co. v. Hutchinson, 204 Cal.App.2d 242....)"

In the *Abstract Investment Co.* case a landlord commenced an unlawful detainer action to recover possession of premises leased to and occupied by a Negro under a month-to-month tenancy. A judgment for plaintiff was reversed on the ground that it was prejudicial error to deny defendant an opportunity to show that he was being evicted solely because of his race. The court held in that case that if defendant could have proved racial discrimination "it would bar the court from ordering his eviction because [fol. 172] such 'state action' would be violative of" the federal Constitution. (Abstract Investment Co. v. Hutchinson, *supra*, 204 Cal.App.2d 242, 255.)

The trial court in the present case concluded that it was bound by the *Abstract Investment Co.* case and, further, that if article I, section 26, which was adopted following the decision in that case, could be construed as requiring a court to enforce a landlord's decision to evict a tenant because of race, it could not be given that effect for federal constitutional reasons.

Although it appears that the instant case is factually indistinguishable from the *Abstract Investment Co.* case, we are not required to rely upon that case in affirming the judgment herein. We have held today that article I, section 26, upon which defendant relies for the declaration of his rights, is, in its entirety, an unconstitutional infringement of the Fourteenth Amendment. (Mulkey v. Reitman, *ante*,

p. ——.) For that reason, as well as those relied upon by the trial court, defendant's cross-complaint is not meritorious, and judgment for plaintiffs is affirmed.

Peek, J.

We Concur:

Traynor, C. J., Peters, J., Tobriner, J., Burke, J.

[fol. 173]

L. A. 28422

PRENDERGAST,

v.

SNYDER.

DISSENTING OPINION OF WHITE, J.

To

OPINION OF PEEK, J.

I dissent.

For the reasons stated in my dissent in Mulkey v. Reitman, *ante*, p. ——, I would reverse the judgment.

White, J.*

I Concur: McComb, J.

[fol. 173a] Petition for rehearing in both cases (omitted in printing).

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* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

[fol. 174]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

LINCOLN W. MULKEY et al.,
Plaintiffs and Appellants,

v.

NEIL REITMAN et al.,
Defendants and Respondents.

MODIFICATION OF OPINION—June 8, 1966

By the Court:

The opinion herein, appearing in 64 A.C. 557, is modified by striking the paragraph beginning at the bottom of page 563 and ending at the top of page 564 and substituting in lieu thereof the following:

> It is now beyond dispute that " . . . among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." (Shelley v. Kraemer, 334 U.S. 1, 10; see also Buchanan v. Warley (1917) 245 U.S. 60, 62; Brown v. Board of Education (1954) 347 U.S. 483; Barrows v. Jackson (1953) 346 U.S. 249; Jackson v. Pasadena City School Dist. (1963) supra, 59 Cal.2d 876; Sei Fujii v. State of California (1952) 38 Cal.2d 718.)

Mosk, J., did not participate.

[File endorsement omitted]

[fol. 175]

Order Due June 9, 1966.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

No. 28360

MULKEY et al.,

v.

REITMAN et al.

ORDER DENYING REHEARING—June 8, 1966

White, J., sitting pro tempore in place of Mosk, J., who deemed himself disqualified.

Opinion Modified.

Respondents' petition for rehearing Denied.

McComb, J., and White, J., are of the opinion that the petition should be granted.

Traynor, Chief Justice.

[File endorsement omitted]

[fol. 176]
[Stamp—Filed—Jun 8 1966—William I. Sullivan, Clerk, By Bishel, O. F. Deputy.]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PRENDERGAST et al.,

v.

SNYDER.

White, J., sitting pro tempore in place of Mosk, J., who deemed himself disqualified.

ORDER DENYING PETITION FOR REHEARING—June 8, 1966

Respondents' petition for rehearing Denied.

McComb, J., and White, J., are of the opinion that the petition should be granted.

Traynor, Chief Justice.

[fol. 177] Clerk's Certificates (omitted in printing).

[fol. 178]

SUPREME COURT OF THE UNITED STATES

No. 483—October Term, 1966

NEIL REITMAN, et al., Petitioners,

v.

LINCOLN W. MULKEY, et al.

ORDER ALLOWING CERTIORARI—December 5, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

December 5, 1966